TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 96

THE PEOPLE OF PUERTO RICO, PETITIONER,

vs.

RUBERT HERMANOS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1939.

No. 3631.

RUBERT HERMANOS, Inc.,

DEFENDANT, APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,

PLAINTIFF, APPELLEE.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO,
FROM JUDGMENT, JULY 26, 1940.

TRANSCRIPT OF RECORD.

J. HENRI BROWN,
JAIME SIFRE, Jr.,
for Appellant.
WILLIAM CATTRON RIGBY,
for Appellee.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1940

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1939.

No. 3631.

RUBERT HERMANOS, INC.,
DEFENDANT, APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD.

[FILED IN CIRCUIT COURT OF APPEALS SEPTEMBER 28, 1940.]

IN THE SUPREME COURT OF PUERTO RICO.

No. 2.

THE PEOPLE OF PUERTO RICO, Plaintiff,

v.

RUBERT HERMANOS, INC., Defendant.

QUO WARRANTO.

AMENDED COMPLAINT.

[Filed February 26, 1937.]

Now comes The People of Puerto Rico, by its Attorney General Benigno Fernandez Garcia, and respectfully complains against Rubert Hermanos, Inc., respondent herein, a corporation organized and operating under the laws of Puerto Rico, as follows:

(a) Said corporation, Rubert Hermanos, Inc., was organized under the laws of Puerto Rico on April 21, 1927, and its articles

of incorporation were filed in the office of the Executive Secretary of Puerto Rico on April 27 of the same year. A certified copy of the articles of incorporation of the defendant company, marked "Exhibit A", is attached to the present complaint as a part thereof.

(b) The aims or purposes sought by the said domestic corporation in organizing itself, which were authorized by the approval of its articles of incorporation, are, among others, as follows: to exploit agriculture in gener[illegible], to acquire, develop and manage undertakings, having for their object the planting, cultivation and harvesting of sugar cane; to plant, cultivate and harvest sugar cane plantations thus working the lands in its possession; and to purchase and hold farms and plantations.

(c) Subdivision (f) of section 4 of the aforesaid articles of incorporation provides, however, that the right of the aforesaid corporation to hold and control land in the Island of Puerto Rico is restricted to 500 acres only; such restriction being expressly described in conformity with the restrictions established in section 3 of the Joint Resolution of the Congress of the United States of America, approved May 1, 1900 (Joint Resolution No. 23, 56th Congress; First Session, 31 Statutes at Large 716, Code of the United States, Title 48, Section 752).

(d) The aforesaid domestic corporation was thus authorized to engage in agriculture, was restricted by its articles of incorporation to own and control not more than 500 acres, and was warned by said articles of incorporation that the aforesaid restriction was imposed by law. Yet notwithstanding the express prohibition contained in its articles of incorporation and besides in open violation of Joint Resolution No. 23 of the 56th Congress, First Session, approved May 1, 1900 (31 Statutes at Large 716, United States Code, Title 48, Section 752), said corporation owns and controls at present in full ownership, and has owned and controlled for some time, several estates in excess of 500 acres, which it applies to the planting, cultivation and harvesting of sugar cane. The aforesaid estates are described in the enclosed certificates marked "Exhibits B and C" and made part of this complaint.

(e) The total area of farming land which the defendant corporation now owns and controls and which, as already stated, it applies to agriculture, covers some 12,188 acres.

(f) The holding and control by the defendant of land forming large estates, as hereinbefore alleged, is contrary to the public policy long established and frequently declared of The People of Puerto Rico and is clearly in conflict with the economic well being of The People of Puerto Rico.

1. The public policy of The People of Puerto Rico against the holding and control of land in large estates by organized companies representing accumulations of capital as was first enunciated by Joint Resolution No. 23 of the 56th Congress, First Session, approved May 1, 1900 (31 Statutes at Large 716, Code of the United States, Title 48, Section 752) has been frequently reiterated and strengthened by administrative authorities of The People of Puerto Rico, specifically including (and this does not limit the above general principles) House Bill No. 13, Second Special Session of the 13th Legislature, June 26, 1935, (approved by the House of Representatives); substitute Senate Bill for House Bill No. 13, Second Special Session of the 13th Legislature (approved by both Houses of the Legislature and vetoed by the Governor because in his opinion it was not sufficient to meet the policy therein declared); Act No. 33, of the 13th Legislature, Second Special Session, approved July 22, 1935; Act No. 47, 13th Legislature, Second Special Session, approved August 7, 1935; Act No. 48, 13th Legislature, Second Special Session, approved August 7, 1935; Act No. 44, 13th Legislature, Second Special Session, and the Senate Resolution of February 13, 1935.

2. The total area of Puerto Rico is only some 3,435 square miles, that is, some 2,198,400 acres, of which only 1,222,284 are fit for cultivation. The population of Puerto Rico in 1930 was 1,543,913 inhabitants and according to conservative estiinates the present population amounts to 1,700,000, giving an average of 494.9 persons per square mile. This shows an increase of population from 325.5 persons per square mile in 1910 to 378.4 in

1920, and to 449.5 in 1930. Of this population, 72.3 per cent live in rural zones and depend entirely on agricultural pursuits for their subsistence. Thus in the Island, there is only an average of something less than one acre of land, fit for cultivation, per rural person directly depending thereon for his subsistence.

3. Out of the aforesaid 1,222,284 acres of land fit for cultivation, some 251,000 acres or something over 1/5 are applied to the production of sugar. Of such lands thus applied to the production of sugar, not less than 196,757 acres, or something over 72 per cent, which is above 16 per cent of the total area fit for cultivation, is owned or controlled by organized companies representing aggregate capital belonging almost exclusively to absent stockholders. Normally, the sugar output is 67 per cent of the agricultural wealth of Puerto Rico. The organized companies above referred to produce, normally, 59 per cent of the total output of sugar in the Island, thus controlling almost 40 per cent of the total agricultural wealth. During the decade from 1920 to 1930 the total area of the estates in Puerto Rico, managed by their owners decreased by 318,232 acres and the area of estates managed by directors increased by some 325,425 acres. The total farming area covers approximately 1,979,474 acres, and thus almost one-sixth of the total farming area has been transformed from estates managed by their owners to farms worked by directors during a single decade.

Therefore, The People of Puerto Rico, through its aforesaid Attorney General, prays this Honorable Court to adjudge the said domestic corporation to have forfeited its franchise, to order its immediate dissolution, to prohibit it to do business in Puerto Rico and to impose on the same the proper fine, with all other pronouncements which in equity and justice are pertinent in the premises.

THE PEOPLE OF PUERTO RICO,
by BENIGNO FERNANDEZ GARCIA,
Attorney General.

Copy served this twenty-fourth day of February, 1937.

J. SIFRE, Jr.,
Attorney for the Respondent.

[Title omitted.]

ANSWER OF DEFENDANT, RUBERT HERMANOS, INC.

[Filed August 19, 1937.]

Now comes the defendant, Rubert Hermanos, Inc., through its undersigned attorneys and without waiving its demurrer to the jurisdiction of this court or its other demurrers filed in this proceeding and in answer to the amended complaint respectfully alleges and says:

I. It admits the averments made in paragraph (a) of the amended complaint.

II. Of the averments made in paragraph (b) of the amended complaint this defendant admits that among the purposes or objects which it was authorized by its Articles of Incorporation to pursue there are included that of devoting itself to agricultural pursuits in general; the purchase, development and management of enterprises having as their object the planting, cultivation and harvesting of sugar cane; the planting, cultivation and harvesting of sugar cane, in that way developing the lands in its possession, and purchasing and possessing estates and plantations; but this defendant alleges that the above are not the only objects or purposes for which it was incorporated, and that it was also authorized by its charter to engage in the Island of Puerto Rico or elsewhere in the manufacture of sugar, molasses, and other by-products of sugar, and to buy, sell, and in general to trade in sugar either raw or refined, in molasses and other by-products of sugar and to build up, purchase, own, lease or in any other way acquire, develop, promote, organize, handle, conduct and manage enterprises having for their aim and object the manufacture and sale of sugar either raw or refined, molasses and other by-products

of sugar, and to erect, purchase or in any other way acquire centrals, mills, establishments or factories, with all the buildings, installations, annexes, accessories and implements necessary or suitable for the manufacture and preparation of sugar, molasses and other by-products of sugar. The defendant further alleges that by section 4 of its charter it was authorized to engage in any and every object or purpose as mentioned in the said section.

III. Of the averments made in paragraph (c) of the amended complaint it admits that subdivision "f" of the articles of incorporation provides, among other things, that the right of the corporation to own and control land in the Island of Puerto Rico shall be limited to five hundred acres only and that this right is "subject to the restrictions established by Section 3 of the Joint Resolution of May 1, 1900, approved by the Congress of the United States of America", but it contends that the five hundred acre limitation is applicable in the event that the defendant should wish to engage in "agriculture" as its main object and that the other restrictions of the said Joint Resolution of which mention is made herein are applicable to this corporation in the pursuit by it of the manufacture of sugar which is an industrial pursuit, and such restrictions prohibit it from holding or possessing real property except such as may be reasonably necessary to enable it to carry out the purposes for which it was created.

IV. In answer to the averments in paragraph (d) of the amended complaint, this defendant admits having been authorized to engage in agriculture, but it alleges that it was also authorized to engage in all or any of the purposes and objects mentioned in its charter, which also include the manufacture of sugar and molasses, which is a purely industrial pursuit. The defendant admits that according to its charter "the right of the corporation to own and control land in the Island of Puerto Rico shall be limited to five hundred acres only, and subject to the restrictions established in Section 3 of the Joint Resolution of May 1, 1900, as approved by the Congress of the United States of America"; but it alleges that the restriction or prohibition in regard to owner-

ship and control of not more than five hundred acres does not apply to this defendant as regards the authority expressly given to it by the franchise granted it by The People of Puerto Rico to engage also in industrial objects and purposes, jointly with the other objects or purposes or to the exclusion of any one of them. This defendant alleges that among the various purposes for which it was incorporated under the express authority of its franchise it chose as its main purpose or object the manufacture and production of sugar and molasses for sale in the Island and in continental United States, and to this end it acquired a sugar central or factory generally known as "Central San Vicente", located in the municipal district of Vega Baja, in this Island, with machinery, equipment, annexes, private railway, telephone system and other holdings and properties required for the manufacture of sugar and molasses; that from time to time this defendant has made improvements on said factory to such an extent that it has now become a modern factory equipped with the means of turning sugar cane into raw sugar and molasses. This defendant further alleges that the said factory has capacity for grinding during each grinding season or industrial year as much as 350,000 tons of cane; that this defendant for the purpose of securing part of the raw materials necessary to enable it to engage in the manufacture of sugar and in the sugar industry, and making use of an implied and incidental faculty or power, also acquired the land reasonably necessary in order to obtain therefrom, through the planting and cultivation of sugar cane, part of the sugar cane which it must grind during each grinding season in its industry of manufacturing sugar and producing sugar and molasses, and that the land thus acquired for this purposes and object does not furnish all the cane needed to be ground in each grinding season or industrial year; that the defendant could not engage in the manufacture of sugar upon an efficient and economic basis if it had to depend entirely on the cane that might be purchased from planters and other persons; that this defendant must count during each grinding season or industrial year upon a minimum of cane

of its own or grown by it in order to be able to operate and run its business in an economic and efficient manner and that the lands acquired and owned by it at present are those which it indispensably and reasonably requires in order to obtain part of the raw material, without which it could not engage in the manufacture of sugar and molasses on an economic and efficient basis; this defendant alleges that in engaging, as it has done, in the manufacture of cane sugar and molasses, through the acquisition, within its implied and incidental powers, of the land reasonably necessary to enable it to carry out the above purpose, that is, to obtain part of the raw material, it has not violated either its franchise or the Joint Resolution of May 1, 1900, nor any part or provision whatever of said franchise or of the said Joint Resolution.

In answer to the averments made in paragraph (e) of the amended complaint, this defendant admits that it owns and controls the lands mentioned in said paragraph (e), but denies to be engaged in agriculture on said lands or on any part thereof, as a principal corporate object or purpose, and on the contrary alleges that it devotes part of said lands, using the incidental and implied power which it has to the planting and cultivation of sugar cane, as a means of obtaining part of the raw material, *i.e.*, sugar cane which is indispensable to this defendant in its industry of manufacturing and producing for sale, sugar and molasses, which is the principal object or purpose to which this defendant devotes itself and has devoted itself ever since it started in business, and without such raw material this defendant would be unable to engage in the manufacture of sugar. This defendant alleges that part of its lands are used for roads and other requirements of the corporation; that the defendant's factory as well as other buildings are erected thereon and that not all of said lands are suitable for growing cane, nor are they all devoted to the growing of cane.

VI. In answer to the averments made in paragraph (f) of the amended complaint, this defendant denies that the holding or control of lands owned by the defendant or of any part thereof is or ever has been contrary to the public policy of The People

of Puerto Rico; it denies that the ownership or control of its lands or any part thereof is or has ever been in conflict with the material well-being of The People of Puerto Rico.

In answer to the averments made in subdivision (1) of paragraph (f) of the amended complaint, this defendant denies that Joint Resolution No. 23 of the 56th Congress, 1st Session, approved on May 1, 1900, or any part thereof, sets or has set forth or enunciated any public policy forbidding the concentration of land in large holdings by corporations, and alleges on the contrary that the limitation imposed by such law on the holding and control of not more than five hundred acres solely and exclusively refers to the concentration of large holdings by agricultural corporations, other non-agricultural corporations being allowed or authorized by the said Joint Resolution to own and hold as much real property as is reasonably necessary to enable them to carry out the purposes for which they are created, and the defendant alleges that such non-agricultural corporations may, without incurring in the violation of any statute, control and own large tracts of land if that is reasonably necessary to enable them to carry out their purposes. This defendant alleges that non-incorporated associations as well as civil partnerships, trusts and other non-corporate companies and entities may, without incurring in any violation of any law, own and control in this Island land in large holdings and that as a matter of fact partnerships and other unincorporated companies own and control in Puerto Rico large tracts of land. This defendant denies that any public policy against the holding or control of land concentrated in large tracts has been affirmed or strengthened by the authorities or by any of the governmental officers of The People of Puerto Rico, although it is admitted by this defendant that the present Attorney General and some other officers have gone on record as opposed to the holding or control of land in excess of five hundred acres. This defendant, however, alleges, on information and belief, that more than thirty years elapsed after the passage of said Joint Resolution without The People of Puerto Rico taking any action in the courts

involving the holding or control of land by corporations, and this defendant further alleges, on information and belief, that for more than thirty years The People of Puerto Rico has, by its inaction, tolerated and consented to the holding and control of large tracts of land by sugar corporations, it being aware of the number of cuerdas of land possessed by such corporations, upon which it collected taxes, licenses and other imposts.

This defendant denies that any public policy has been affirmed or strengthened by House Bill No. 13 of the 13th Legislature, Second Special Session, of June 26, 1935, or by Senate Bill in substitution of House Bill No. 13, of the 13th Legislature, Second Special Session, nor by the aforesaid Resolution of the Insular Senate of February 13, 1930, or by any of the aforesaid bills; and it, on the contrary, alleges that said Senate bills and resolution never did or could set up any public policy of The People of Puerto Rico against the holding or control of lands concentrated in large holdings, or in any other sense or manner, as said bills or resolution were never enacted into laws. For lack of information and belief to enable it to answer if the said substitute Senate bill was vetoed by the Governor of Puerto Rico on the ground, that in his opinion, it was insufficient to establish the so-called public policy which it claims to declare, or any other policy, this defendant, therefore, denies said allegation in whole and in part, and on information and belief, denies that Act No. 33 of July 22, 1935, or Acts Nos. 47 and 48 of August 7, 1935, or Act No. 44 of August 6, 1935; or any of said Acts or part thereof, express the so-called public policy referred to by plaintiff. This defendant further alleges that the said Acts Nos. 44 and 48 of August 6 and 7, 1935, respectively, refer to amendments to the Eminent Domain Act of 1903 in the event that any general plan of reconstruction "be first approved by the Finance Committee of the Legislature of Puerto Rico", and to the imposition of penal sanctions by district courts for violations of the provisions of the Joint Resolution of Congress of May 1, 1900.

In answer to the averments made in subdivision 2 of paragraph

(f) of the amended complaint, this defendant admits that Puerto Rico has an area of 3,435 square miles or some 2,198,400 inhabitants; it likewise admits that the population of this Island according to the 1930 census was 1,543,913 inhabitants and that the number of people per square mile went up from 325.5 persons in 1910 to 378.4 in 1920 to 449.5 in 1930, and this defendant denies all the other particulars set out in subdivision 2 of paragraph (f) of the amended complaint in general and each of them in particular for lack of information and belief.

For lack of information and belief this defendant can not answer the averments made in subdivision 3 of paragraph (f) of the amended complaint and it therefore denies all such matter and particulars in general and each of them in particular.

As new matter and as separate and special defences, this defendant respectfully alleges as follows:

1. That of the several purposes or objects for which it was incorporated and expressly authorized by its franchise, this defendant chose as its main purpose or object the manufacture and production of sugar and molasses in the Island of Puerto Rico to be sold in this Island and in the continental United States and for this purpose it acquired a sugar central or factory located in the municipal district of Vega Baja of this Island with machinery, equipment, annexes, a private railway, a telephone system and other articles and properties required for manufacturing sugar and molasses; that the sugar and molasses manufactured by this defendant in its factory are obtained from sugar cane without which this defendant could not and can not manufacture in said factory sugar and molasses; that in order to obtain and secure at least part of the raw material indispensable for operating and running its factory and to be able to engage in the sugar industry, upon an economic and efficient basis, availing itself of the incidental or implied power which it has, it likewise acquired the land reasonably necessary to enable it to engage in the manufacture of sugar and molasses and to meet other needs of the business or undertaking of this corporation, in which it has invested several million

dollars and without which it could not engage in the said business; that it derives from part of such land, through the planting and cultivation of sugar cane, part of the cane required to be ground in each grinding season or industrial year so that this defendant may run and operate its central or sugar factory on an efficient and economic basis, and that the remaining sugar cane needed in each grinding season or industrial year is obtained by this defendant by purchase from several planters who sell their crops to it; that this defendant would be unable to engage in the industry of manufacturing sugar on an efficient and economic basis if it had to depend entirely on the sugar cane that it might purchase; that this defendant must have canes of its own or grown by it in order to be sure of at least part of the canes which it must grind during each grinding season or industrial year. This defendant further alleges that out of about 183,968.92 tons of canes ground in its factory during the grinding season or industrial year of 1935, about 116,370.12 came from planters and the remainder from canes grown on land of this defendant; that during the grinding season or industrial year of 1936, about 240,343.50 tons of canes were ground in its factory, of which about 147,586.66 came from planters and the remainder from canes grown on land of this defendant; that during the grinding season or industrial year of 1937, about 292,468.14 tons of canes were ground in its factory, of which about 169,134.38 tons came from planters and the remainder from canes grown on land of this defendant, and that in none of these years did the defendant have the number of tons of canes required for running defendant's factory at full capacity.

2. This defendant alleges that the Joint Resolution of Congress which in Section 3 provides for restrictions in regard to the holding and control of lands by corporations was enacted in the year 1900; that since then and until recently, from time to time various corporations have been organized in Puerto Rico to engage in the manufacture of sugar which is the principal and most important industry in the Island, upon which thousands of workmen and laborers depend for their subsistence, and that many of such cor-

porations, according to the information and belief of the defendant, gradually acquired real property in excess of the five hundred acres in order to grow thereon the amount of sugar cane necessary and indispensable for manufacturing sugar and molasses; that many millions of dollars have been invested in the sugar industry in Puerto Rico and that many of the corporations engaged in such industry have issued and sold stock to residents and non-residents who acquired the same in good faith. The defendant alleges, on information and belief, that The People of Puerto Rico tolerated, allowed and encouraged the development of the sugar industry during all these years until it reached the present stage; and this defendant further alleges, upon information and belief, that never during all that time were any proceedings brought challenging or questioning the right of a sugar corporation to own and control more than five hundred acres, provided this was reasonably necessary in order to obtain the raw material for the purpose of manufacturing and producing sugar and to engage in the sugar industry; that The People of Puerto Rico collected and still collects taxes upon the property of such corporations, as well as other taxes and imposts, and that through the Government's officers, departments and other agencies it always had or could have had information as to the land acquired by most of the corporations engaged in the sugar industry, and that in spite of that it was not until 1936 when, according to the information and belief of this defendant, The People of Puerto Rico for the first time brought proceedings questioning or challenging the right of a corporation, engaged like this defendant in the sugar industry, to hold or control land in excess of five hundred acres, whenever this was necessary in order to obtain the raw material or part thereof, that is, sugar cane, to be ground in its factory; that this defendant acquired the sugar central or factory, as well as practically all the lands which it owns, in 1927, and that since then this defendant has been using the factory and its lands in the business of manufacturing cane sugar and molasses, getting from some of said land part of the raw material required for such

manufacture or industry, namely, sugar cane, and that during all these years this defendant has done so publicly, its lands being recorded in its name in the registries of property in the Island of Puerto Rico, with the knowledge of the officers and departments of the Government of Puerto Rico, it having paid during all these many years to the Government of Puerto Rico taxes on its properties, including its lands, as well as other taxes and imposts without the Government of Puerto Rico or any of its departments or agencies objecting, until these proceedings were brought, to the business of this defendant or to its owning or controlling land in excess of five hundred acres in order to provide itself with canes to be ground in its factory, for which reason the plaintiff, because of its acquiescence and delay in suing, is barred from cancelling the franchise of this corporation.

For the foregoing reasons this defendant respectfully prays the court to dismiss, in due course of law, the amended complaint filed by The People of Puerto Rico in the present case.

San Juan, Puerto Rico, August 19, 1937.

JAIME SIFRE, JR.,
ORLANDO J. ANTONSANTI,
Attorneys for the Defendant.

I, Jose Gonzalez Hernandez, declare and state on oath that I am of age, married and a resident of Santurce, in the municipality of San Juan, P. R.; that I am vice-president and director of the domestic corporation named Rubert Hermanos, Inc., defendant herein; that as such vice-president and director I am acquainted and familiar with the affairs and business of the defendant corporation; that I have read the foregoing answer and that the facts therein stated are true as they are known to me personally, except where they are alleged in the said answer on information and belief, which I also believe to be true, and that this oath is not taken by Rubert Hermanos, Inc., as being a corporation and the same is taken by affiant as its vice-president and director.

JOSE GONZALEZ HERNANDEZ.

AFFIDAVIT NO. 1053.

Sworn to and subscribed before me by Jose Gonzalez Hernandez, of age, married, property owner and a resident of Santurce, in the municipality of San Juan, Puerto Rico, vice-president and director of the domestic corporation Rubert Hermanos, Inc., and who is personally known to me.

San Juan, P. R., August 19, 1937.

RAMON C. JULIA,
Notary Public.

Served with copy this nineteenth day of August, 1937.

B. FERNANDEZ GARCIA,
Attorney General of Puerto Rico.

[Title omitted.]

JUDGMENT.

San Juan, Puerto Rico, July 30, 1938.

For the reasons stated in the foregoing opinion, judgment is hereby rendered in favor of The People of Puerto Rico, petitioner herein, and against Rubert Hermanos, Inc., defendant, with the following pronouncements.

1. It is adjudged and decreed that the defendant corporation Rubert Hermanos, Inc., is engaged in agriculture and is guilty of owning and controlling 12,188 acres of land in violation of the provisions of Joint Resolution No. 23 of the Congress of the United States (31 Statutes at Large 716, U.S.C.A., Title 48, sec. 752), of section 39 of the Organic Law of Puerto Rico and of its own articles of incorporation, by all of which provisions the said defendant corporation is expressly limited and restricted to the ownership and control of lands not in excess of 500 acres.

2. The forfeiture and cancellation of the license of the defendant corporation and of its articles of incorporation is hereby ordered and decreed, as well as the immediate dissolution and winding up of the affairs of said corporation.

3. The defendant corporation is adjudged to pay the costs and disbursements of this proceeding, including the sum of two thousand dollars ($2,000) as attorney's fees.

4. The defendant corporation is sentenced to pay a fine in the sum of $3,000.

It was thus pronounced and ordered by the court as witness the signature of the Chief Justice. Mr. Justice Wolf concurred in many parts of the opinion and in the first pronouncement of the judgment. As regards some of the other pronouncements he has some doubts as to the power of the court, which might perhaps be cleared up after a more careful study, and he has also some doubts, even if the court had such power, whether the same should be exercised in the way it has been done, reserving to himself a fuller statement of his views. Mr. Justice de Jesus took no part in the decision of this case.

EMILIO DEL TORO,
Chief Justice.

Attest: B. MARRERO RIOS, *Acting Secretary.*

[Title omitted.]

MOTION FOR THE APPOINTMENT OF A RECEIVER.

[Filed July 30, 1938.]

Now comes The People of Puerto Rico, petitioner herein, through the undersigned Attorney General, and respectfully alleges:

1. This Honorable Court has recently rendered judgment in the above-entitled case (1) ordering the dissolution of the respondent corporation and (2) decreeing the forfeiture and cancellation of the license of the respondent corporation.

2. Such dissolution and disposition of the property of the respondent shall be entrusted to a receiver.

In view of the foregoing and pursuant to the provisions of subdivisions 4 and 5 of Section 182 of the Code of Civil Procedure in force, The People of Puerto Rico prays this Honorable Court

to make an order for the appointment of a receiver in accordance with law.

B. FERNANDEZ GARCIA,
Attorney General.

MIGUEL GUERRA-MONDRAGON,
RAFAEL RIVERA ZAYAS,
Counsel.

[Same title.]

ORDER.

San Juan, Puerto Rico, November 9, 1938.

The motion of the plaintiff, duly notified, requesting that its motion for the appointment of a receiver filed July 30, 1938—hearing of which had been set for this date—be left in abeyance, is hereby sustained.

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

[Filed March 28, 1940.]

To the Clerk of the Supreme Court of Puerto Rico:

Sir: We beg to hand you herewith the sum of six thousand dollars ($6,000) in United States currency to be applied to the payment of the judgment rendered herein on July 30, 1938, to wit:

$3,000 to cover the fine;
$2,000 to cover attorney's fees; and
$1,000 which we consider sufficient to cover the costs.

Should the latter amount to a sum in excess of the one enclosed

herein, we shall remit the difference as soon as we are informed of the fact.

This money is placed at the disposal of the complainant.

We imagine that the court shall decide whether this amount must remain in deposit until it receives the mandate from the Supreme Court of the United States or whether it shall be delivered now to the complainant.

San Juan, Puerto Rico, March 28, 1940.

JAIME SIFRE, JR.,
J. HENRI BROWN,
Attorneys for the Respondent.

[Title omitted.]

ORDER.

San Juan, Puerto Rico, March 30, 1940.

The court having been notified of the aforegoing document filed by counsel for the respondent, it hereby orders that the sum of $6,000 received by the secretary-reporter be deposited until further notice in a bank of well-known reputation, and the final disposition of said sum is left in abeyance until the mandate is received from the Supreme Court of the United States.

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

MOTION REQUESTING SETTING OF MOTION FOR THE APPOINTMENT OF A RECEIVER.

[Filed May 13, 1940.]

Now comes The People of Puerto Rico by its Attorney General and respectfully states that:

1. On July 30, 1938 The People of Puerto Rico filed the follow-

ing motion requesting from this Honorable Court the appointment of a receiver, as follows:

"Now comes The People of Puerto Rico, petitioner herein, through the undersigned Attorney General, and respectfully alleges:

"1. This Honorable Court has recently rendered judgment in the above-entitled case (1) ordering the dissolution of the respondent corporation and (2) decreeing the forfeiture and cancellation of the license of the respondent corporation.

"2. Such dissolution and disposition of the property of the respondent shall be entrusted to a receiver.

"In view of the foregoing and pursuant to the provisions of subdivisions 4 and 5 of Section 182 of the Code of Civil Procedure in force, The People of Puerto Rico prays this Honorable Court to make an order for the appointment of a receiver in accordance with law."

By order of July 30, 1938, this Honorable Court set the hearing of the aforesaid motion for November 9, 1938, at 2 P.M.

On November 9, 1938, The People of Puerto Rico moved this court to stay the hearing of the aforesaid motion until the superior courts decided the appeal taken by the respondent corporation from the judgment rendered by this Honorable Court on July 30, 1938.

2. On this day—May 13, 1940—at 8:57 A.M., the clerk of this Honorable Court received notice from the Supreme Court of the United States to the effect that said high tribunal had affirmed under date of March 25, 1940, the judgment rendered by this court on July 30, 1938, and remanding, furthermore, the cause for further proceedings.

Wherefore, The People of Puerto Rico prays again that the motion for the appointment of a receiver be set for a date in the near future.

Respectfully,

GEORGE A. MALCOLM,
Attorney General.

MIGUEL GUERRA-MONDRAGON,
RAFAEL RIVERA ZAYAS,
LUIS VENEGAS-CORTES,
Of counsel.

[Title omitted.]

ORDER.

San Juan, Puerto Rico, May 23, 1940.

Whereas, on the 13th instant the mandate of the Supreme Court of the United States was received in the above-entitled case and according to same the said superior court reversed on March 25, 1940 the judgment rendered on appeal on September 27, 1939, by the United States Circuit Court of Appeals for the First Circuit;

Whereas, the Supreme Court of the United States sentences the respondent to the payment of costs, amounting, according to the mandate, to the sum of $78.58 and remands the case to this court for further proceedings not inconsistent with the opinion delivered by that court of last resort;

Therefore, with the object of executing the judgment rendered by the Supreme Court of the United States, the secretary-reporter is hereby authorized to pay to the complainant the following amounts from the sum of $6,000 deposited under his custody by the respondent:

To pay the fine to which the respondent was sentenced by this court on July 30, 1938	$3,000.00
To pay the attorney's fees of the complainant to which the respondent was sentenced by this court on July 30, 1938	2,000.00
To pay the costs granted to the complainant by the judgment rendered by the Supreme Court of United States	78.58
Total	$5,078.58

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

ORDER.

San Juan, Puerto Rico, June 4, 1940.

The hearing set for the th instant of the motion for the appointment of a receiver, i ereby transferred to June 24, 1940, at 2 P.M.

It was so ordered by court as witness the signature of the Acting Chief Justice.

ADOLPH G. WOLF,
Acting Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

ANSWER AND OPPOSITION TO THE MOTION FOR THE APPOINTMENT OF A RECEIVER.

[Filed June 24, 1940.]

Now come Manuel Gonzalez Martinez, Rafael Martinez Dominguez, Jose Gonzalez Hernandez, Aureo Garcia and Gabriel Soler, as liquidating trustees of the respondent corporation Rubert Hnos. Inc., by their undersigned attorneys, and by way of answer and opposition to the motion for the appointment of a receiver, state:

I. The judgment of the court has been complied with. The corporation has been dissolved, its obligations have been extinguished and it has disposed of its properties by unanimous agreement of its stockholders and of the liquidators appearing herein.

II. Even if the corporation had not been liquidated, this court lacks jurisdiction in this proceeding to appoint a receiver because:

(a) The Quo Warranto Act does not authorize the court to appoint a receiver in such proceeding.

(b) The quo warranto proceeding is not pending, but has been finished;

(c) Neither the Attorney General nor The People of Puerto Rico are empowered or authorized by law to request the appointment of a receiver in a quo warranto proceeding or in a proceeding for the dissolution of corporations.

III. Even in the supposition that jurisdiction and statutory authority existed for the appointment of a receiver the motion should be denied because:

(1) The motion is insufficient and does not state facts justifying the appointment of a receiver;

(2) The appointment of a receiver would deprive those who were stockholders of the corporation of their property and rights without due process of law; and

(3) The appointment of such receiver would amount to judicial legislation by the court and would violate the prohibition against ex post facto legislation contained in the Organic Act of Puerto Rico.

By virtue whereof they respectfully request that the motion for the appointment of a receiver be overruled.

San Juan, Puerto Rico, June 24, 1940.

JAIME SIFRE, JR.,
HENRI BROWN,
Attorneys for the Respondent.

Copy served this twenty-fourth day of June, 1940.

GEORGE A. MALCOLM,
Attorney General of Puerto Rico,
by MIGUEL GUERRA-MONDRAGON, *Attorney.*

[Title omitted.]

MINUTES OF THE HEARING OF THE MOTION FOR THE APPOINTMENT OF A RECEIVER.

San Juan, Puerto Rico, June 24, 1940.

In the City of San Juan, Puerto Rico, at 2 P.M. of the day above stated, and before Chief Justice del Toro and Associate Justices Wolf, Hutchison, Travieso and De Jesus, the aforesaid motion was heard.

Attorney Miguel Guerra-Mondragon appeared in behalf of the complainant and attorneys Jaime Sifre, Jr., and Henri Brown for the respondent.

At the request of both parties the court granted them a simultaneous term of ten days to file briefs and ten additional days, also simultaneous, to reply thereto.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

COMPLAINANT'S BRIEF IN SUPPORT OF ITS MOTION FOR THE APPOINTMENT OF A RECEIVER.

[Filed July 5, 1940.]

Statement.

On July 30, 1938, this Honorable Court entered final judgment in this case with a pronouncement, *inter alia*, ordering and decreeing "the forfeiture and cancellation of the license of the defendant corporation and of its articles of incorporation" and also ordering "the immediate dissolution and winding up of the affairs of said corporation".

On the same date, July 30, 1938, The People of Puerto Rico petitioned this Honorable Court to appoint a receiver to carry out the dissolution and disposal of the property of the defendant corporation in accordance with subdivisions 4 and 5 of Section 182 of the Code of Civil Procedure then in force. (Page 777 of the 3rd section of the record of this court.)

On August 3, 1938, defendant corporation appealed from the aforementioned judgment to the Circuit Court of Appeals, First Circuit.

On the said third day of August, 1938, this court called the parties for the purpose of hearing them "regarding the amount of the bond which should be required for the purpose of suspending the execution of the judgment once the appeal is allowed".

On August 6, 1938, The People of Puerto Rico (in its memorandum on the question of the supersedeas bond) contended that the amount of the bond should be sufficient to secure the preservation of the *status quo*. Defendant corporation, in its memorandum of August 6, 1938, on the question of the supersedeas bond, contended that a bond of $15,000 would be sufficient inasmuch as the interest of The People of Puerto Rico, if it had any interest in the properties of defendant, would be "completely protected by the *lis pendens* annotation made in the Registry of Property upon petition of The People of Puerto Rico".

On August 9, 1938, this court allowed the appeal and fixed the amount of the supersedeas bond in the sum of $25,000.

The appeal was properly prosecuted before the Circuit Court and said court on September 27, 1939, reversed the judgment which had been rendered by the Supreme Court of Puerto Rico on July 30 of the preceding year.

The People of Puerto Rico within the time granted by law duly filed a petition for certiorari in the Supreme Court of the United States. The writ was issued, and after a hearing, the Supreme Court of the United States entered judgment on March 25, 1940, reversing the Circuit Court of Appeals and affirming the judgment rendered by this Honorable Supreme Court on July 30, 1938.

On May 13, 1940, the clerk of this Honorable Court received the mandate of the Supreme Court of the United States. On that same day The People of Puerto Rico petitioned this court to set

a hearing on the motion for the appointment of a receiver. This court set the hearing for this matter for the fifth day of June of the present year.

On June 4, 1940, this court continued the hearing for the 24th of June, 1940, at 2 o'clock in the afternoon.

After the hearing on said date, the parties agreed, with the approval of the court, to submit the question of the appointment of a receiver by the filing of briefs. This is the brief of petitioner.

Principal Objective of the Motion Under Discussion.

The principal objective of the motion for the appointment of a receiver now under discussion is the preservation of the *status quo* (until the proceeding is terminated) with regard to the lands which defendant possesses in excess of 500 acres.

This matter is governed by Act No. 47 (Special Session) approved on August 7, 1935. This statute, which amends the quo warranto Act of 1902 provides in the second paragraph of Section 2 that "The People of Puerto Rico may, at its option, *through the same proceedings*, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered. In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain."

Contrary to defendant's allegation in its "Answer in Opposition to the Motion for the Appointment of a Receiver", the words "through the same proceeding", copied above and underlined, do not signify a different proceeding from the quo warranto proceeding originally filed, but rather the same quo warranto proceeding filed and prosecuted against defendant in question. This contention is supported by other words of the same Act No. 47 of 1935 which we have invoked (2nd paragraph, Section 6) whereby it is provided that when The People of Puerto Rico has chosen to confiscate the real property or it is ordered that the same shall be

sold at public auction, the final judgment shall fix the reasonable price to be paid for the real property of any defendant.

Final judgment was rendered on May 13, 1940, if we take as the date thereof the day on which the mandate was received by the clerk of the Supreme Court. The People of Puerto Rico have until six months thereafter—until November 13, 1940—to elect whether they will file eminent domain proceedings or ask for a public auction in this same quo warranto proceeding. And it is for the purpose of maintaining the *status quo* that a receiver should be appointed by this Honorable Court until The People of Puerto Rico decides which of these two courses it will elect to take in the future.

If The People of Puerto Rico have this right of election and such election may be exercised within a term of six months "counting from the date on which final sentence is rendered" it is only just that this Honorable Court should protect this right.

It is not difficult to determine the intention of the legislator in this respect. Once the dissolution of the corporation is decreed by judgment in a quo warranto proceeding on the ground that it has been guilty of violating the 500 acre law, it was the legislator's intention that the government should retain a certain degree of control over the excess lands in order that its future distribution should comply with the fundamental spirit of the agrarian law—distribution among many farmers—and that said lands should not fall again into the same or a few hands. We do not believe that the local legislature—using the words of Justice Frankfurter—intended that his decrees should be "mere empty words" or that he "was bent on the elaborate futility of brutum fulmen" in approving this legislation. We do not believe that the legislator wished to encourage the construction of a farsical edifice in proceedings of this gravity thus permitting corporations who have been guilty of violating a great social policy to escape as they see fit the sanctions established by the laws by dissolving themselves in their own manner and disposing of their lands ac-

cording to their choice and will as the defendant corporation now purports to do.

A receiver may be appointed (subdivision 4, Section 182, Code of Civil Procedure) "in the case when a corporation . . . has *forfeited* its corporate rights". The judgment in the present case contains such a pronouncement: "Ordering and decreeing the *forfeiture* and cancellation of the license of the defendant corporation, of its articles of incorporation." It is well to keep this particular point in mind so as to avoid confusion with other grounds for the appointment of a receiver. In effect:

Subdivision 4 of section 182, Code of Civil Procedure, provides that a receiver may be appointed—

1. In the case when a corporation has been dissolved.
2. Or is insolvent.
3. Or in imminent danger of insolvency.
4. Or has forfeited its corporate rights.

It is this last ground upon which the present motion is based. And it is well to keep this in mind so that we may be able to distinguish one case from another in reading the authorities on this matter.

The Respondents.

The attorneys for the defendant state that Messrs. Gonzalez Martinez, Martinez Dominguez, Gonzalez Hernandez, Garcia and Soler appear in their capacity as trustees in liquidation of defendant to answer and oppose the petition for the appointment of a receiver.

We deny the right of these gentlemen to appear and intervene in this proceeding and more so when they have not even attempted to show their respective capacities by means of proper evidence. They do not even verify their opposition.

The Opposition.

Assuming that the aforementioned gentlemen have sufficient capacity and personality to intervene, their opposition is frivolous.

They allege in the first place that the judgment of the court

has been complied with. To this we answer that the judgment of the court will not have been complied with until The People of Puerto Rico exhaust the remedies granted to them by Act No. 37 of 1935; that is, the option to which we have referred.

They allege in the second place that the corporation has been dissolved. To this we reply that the defendant corporation has not yet been dissolved. Corporations arise or are organized not when the incorporators sign the articles of incorporation, but, as provided in section 8 of the law of corporations (Code of Commerce, 1932 Edition, p. 332) when the executive secretary so certifies. And corporations cease to exist or are dissolved not when the stockholders agree so to do, but, as provided in Section 26 of the law of corporations (Code of Commerce, 1932 Edition, p. 355) when the executive secretary issues a certificate of dissolution and that certificate is published during four consecutive weeks in a newspaper of the Island. The aforementioned gentlemen have not offered evidence with regard to these fundamental facts. In turn, we offer to this Honorable Court the certificate which is attached hereto issued by the executive secretary and marked "Exhibit A".

The opposing gentlemen allege that defendant has disposed of its properties. Here, too, they have failed to furnish evidence in support of this allegation. On the other hand, the *lis pendens* granted in this case continues to be recorded in the Registry of Property. We do not know what property is referred to in the answer and motion in opposition.

Jurisdiction.

It is alleged (1) that the court has no jurisdiction to make the appointment of a receiver; (2) that the quo warranto statute does not confer jurisdiction for such an appointment; (3) that this proceeding has already been terminated and (4) that petitioner is not authorized to petition for receivership in quo warranto proceedings or proceedings to dissolve a corporation.

(1) This Honorable Court has jurisdiction. Section 182 of

the Civil Code of Procedure reads as follows: "A receiver may be appointed by the court in which an action is pending or has passed to judgment." The proceeding continues to be pending until the six month option of The People of Puerto Rico hereinbefore mentioned expires. The judgment of the Supreme Court of the United States remanded the case for "further proceedings". And the option referred to is one of these "further proceedings".

(2) The quo warranto statute, a special statute, may not provide for a receivership, but the Code of Civil Procedure, a general statute, which applies to all actions confers such power on the court.

(3) This proceeding is not terminated inasmuch as it is pending the action of The People of Puerto Rico with regard to the aforementioned option.

(4) This is not a proceeding for the dissolution of a corporation, but rather for the forfeiture of a license or charter of corporation. One thing is distinct from the other. And the forfeiture of the license having been decreed, a receivership is the only means of securing the right of The People of Puerto Rico to exercise in due time the option in its favor.

Authorities.

In support of the receivership, we will cite the following cases:

East Line & Red River R. Co. v. *State*, 12 S.W. 690, 696.

Texas Trunk R. Co. v. *State ex rel.*; 18 S.W. 199, 201. In this case it was held that the public, the community, has such an interest in the proper management of the property of the corporation that a receiver should be appointed to dispose of the property for the public benefit.

San Antonio Gas Co. v. *State*, 54 S.W. 289, 293, 294. In this case it was held that a receiver can be appointed when the forfeiture of the articles of incorporation is involved. It is there stated:

"To whom shall the property of the defunct corporation be entrusted, if no receiver be appointed? Appellant answers,

to the president and board of directors of the defunct corporation. Article 682, Sayles' Rev. Civ. St., is the only statute that provides that the president and board of directors shall be trustees and take possession of the property of the corporation, and such provision is made only in cases of the dissolution of a corporation. *That the statute draws a distinction between a dissolution and the forfeiture of a charter is shown by the language of section 3, art. 1465, Id.*, where provision is made for a receiver in case of dissolution, insolvency, or forfeiture. When a charter is forfeited, the life of the corporation ceases, and no president and board of directors can survive it, and, unless specially authorized by statute, could not, by virtue of their offices, take control of the property of the corporation. If article 682 could apply to cases in which there has been a forfeiture of a charter by the state, it can only apply when no receiver has been appointed by some court of competent authority. If it be necessary to justify the power given by statute, it may be well to remember that appellant in this case is a quasi public corporation, and for the protection of the public interests it was necessary that a receiver should be appointed. To place the property again in the hands of the officers of the corporation would be to return it to the custody of those who had failed to perform their trust, and had violated the laws of the state, and the public interests would not be subserved thereby. We call attention, in this connection, to *People* v. *Ice Co.*, 18 Abb. Prac. 382, and *Herring* v. *Railroad Co.*, 105 N.Y. 340, 12 N.E. 763.

"That the appointment of a receiver will have the effect of a fine inflicted upon the shareholders in the defunct corporation can have no weight in the decision of a court. The statute plainly confides the authority to the court to make the appointment, and that it will bear heavily upon the shareholders is a matter for legislative, and not judicial, consideration. In this case, at least, the violators of the law will be

the ones who will suffer from the appointment of a receiver. We have treated the question of a receivership as though it was an open one in Texas, but it is not. The statute has been construed by the Supreme Court, and it was held that the trial court, when a charter is forfeited, has the authority, under the statute, to appoint a receiver at the instance of the state, independent of the request of a creditor."

This decision also answers the point raised by the respondents to the effect that "the appointment of a receiver would deprive the stockholders of the corporation of their property and rights without due process of law".

In view of the foregoing reasons, it is respectfully requested that the motion for the appointment of a receiver be sustained by this Honorable Court.

Respectfully,

GEORGE A. MALCOLM,
Attorney General.

MIGUEL GUERRA-MONDRAGON,
RAFAEL RIVERA-ZAYAS,
LUIS VENEGAS-CORTES,
Associate Attorneys.

EXHIBIT A.

The People of Puerto Rico.
Office of the Executive Secretary.

Know All Men By These Presents:

That in accordance with a request of the Hon. The Attorney General of Puerto Rico, and for official use, I, E. D. Brown, Acting Executive Secretary of Puerto Rico, do hereby certify: That from the records of this office it appears that "Rubert Hermanos, Incorporada" is a corporation organized under the laws of Puerto Rico and which has not been dissolved up to this date in any of the ways provided by law.

In witness whereof, I have hereunto set my hand and caused to be affixed the Great Seal of Puerto Rico, at the City of San Juan, this fifth day of July, A.D., nineteen hundred and forty.

E. D. BROWN,
Acting Executive Secretary

[SEAL]

(Issued for Official Use, no fees collected.)

[Title omitted.]

BRIEF IN SUPPORT OF THE "ANSWER AND OPPOSITION TO THE MOTION FOR THE APPOINTMENT OF A RECEIVER".

[Filed July 5, 1940.]

Statement.

This court entered judgment on July 30, 1938, whereby the forfeiture and cancellation of the license and articles of incorporation of Rubert Hnos., Inc., was decreed. The immediate dissolution and the winding up of the affairs of the said corporation was also ordered and decreed. Said judgment also sentenced defendant to pay a fine of $3,000 as well as payment of costs and disbursements of the proceeding including a sum of $2,000 for attorney's fees. After judgment was rendered, attorneys for petitioner filed a motion asking for the appointment of a receiver, alleging as a ground therefor, that the dissolution and disposal of defendant's property should be carried out by a receiver, and invoking subdivisions 4 and 5 of section 182 of the Code of Civil Procedure as provisions which, in the opinion of petitioner, confer jurisdiction upon this court to enter the order prayed for. Defendant appealed from said judgment to the Circuit Court of Appeals for the First Circuit and the judgment of said appellate court reversing the judgment rendered by this court was reviewed by certiorari by the Supreme Court of the United States which court, in turn, reversed the latter's judgment thus affirming the judgment originally appealed from.

The People of Puerto Rico petitioned for a hearing on the motion for the appointment of a receiver and on the date set by this court for such hearing the trustees in liquidation of Rubert Hnos., Inc., filed an answer in opposition alleging the following:

I. The judgment of the court has been complied with. The corporation has been dissolved, its obligations have been extinguished and it has disposed of all its property by the unanimous consent of the stockholders and of the appearing trustees in liquidation.

II. Even though the corporation had not been liquidated this court has no jurisdiction to appoint a receiver in this proceeding because

(a) The quo warranto statute does not authorize the court to appoint a receiver in such a proceeding.

(b) The quo warranto proceeding or suit is not pending but terminated.

(c) Neither the Attorney General nor The People of Puerto Rico are empowered or authorized by law to ask for the appointment of a receiver in a quo warranto proceeding or a proceeding to dissolve a corporation.

III. Even assuming that there is jurisdiction and statutory authority for the appointment of a receiver the motion should be overruled because:

(1) The motion is insufficient and it does not state sufficient facts to justify the appointment of a receiver;

(2) The appointment of a receiver would deprive those who were stockholders of the corporation of their property and rights without due process of law; and

(3) The appointment of a receiver would constitute legislation by the court and would infringe the prohibition with regard to ex post facto laws contained in the Organic Act of Puerto Rico.

ARGUMENT.

I.

Even under the Assumption that Something Remains to be Done or to Liquidate in Connection with the Extinct Corporation and under the Inadmissible Hypothesis, that this Court has Jurisdiction to Appoint a Receiver, such Appointment would be Contrary to Law because of the Insufficiency of the Motion.

The appointment of a receiver, provided there is jurisdiction to make the appointment, which in this case we deny, rests in the sound discretion of the court. This doctrine has been firmly established by the authorities in Puerto Rico, construing section 182 of the Code of Civil Procedure and in California construing section 564 of the Code of Civil Procedure of said State, from which our section 182 was almost literally copied: *Schluter* v. *Texidor*, 26 P.R.R. 97; 22 Cal. Juris., Sec. 12, p. 435; *Copper Hill Mining Co.* v. *Spencer*, 25 Cal. 11.

However, in order that the court may make use of its discretion its jurisdiction must be properly invoked.

"We agree with the respondents that the appointment of a receiver rests in the sound discretion of the court, *but always when the jurisdiction has first been properly invoked.*" *Schluter* v. *Texidor, supra.*

In *Balasquide* v. *Rossy*, 18 P.R.R. 33, this court said the following:

"Generally, the application for a receiver is addressed to the sound legal discretion of the court to be exercised as an auxiliary to the attainment of the ends of justice. But the power is not an arbitrary one, and before judicial action can be justified on the ground of discretion there must be a case calling for the exercise of such discretion."

It is our contention that the motion filed by petitioner does not properly invoke the jurisdiction which in petitioner's opinion this court has and that therefore, even under the hypothesis that such

jurisdiction exists, no ground has been alleged for the exercise of the court's discretion.

It is alleged in the motion that this court entered judgment (1) ordering the dissolution of defendant corporation and (2) decreeing the loss of its franchise or corporate rights, and that

> "Such process of dissolution and disposal of the property of defendant should be entrusted to a receiver."

The motion ends by saying:

> "In view of the foregoing and invoking the provisions of subdivisions 4 and 5 of Section 182 of the Code of Civil Procedure, The People of Puerto Rico pray that this Court enter an order appointing a receiver in accordance with the law."

It is correct to state that in the motion The People of Puerto Rico limits itself to expressing its opinion that the dissolution and disposal of the property should be carried out by means of a judicial administrator.

In *Balasquide* v. *Rossy, supra,* this court said:

> "Upon examining the motion for the appointment of a receiver transcribed at the beginning of this opinion it has come within our observation that the only allegations therein contained are to the effect that the defendant 'may unlawfully dispose of the properties', 'that the petitioner believes that such fraudulent disposition of his properties by the defendant may take place at any time; that he would have no available means to prevent it unless a receiver is appointed,' and that 'besides he has good reasons to believe that there exists the intention to conceal and remove said properties,' although he fails to state what those reasons are.
>
> * * *
>
> "The power to appoint a receiver is a delicate one especially when invoked upon interlocutory ex parte applications and should be exercised with extreme caution and only under circumstances requiring summary relief. . ."

The doctrine established in the *Balasquide* case is approved by all the authorities.

> "The complaint or affidavit on which an application for a receiver is based must state facts which support one or more of the conclusions to be reached by the court before it is authorized to make an appointment; it is not enough to state the conclusions alone, except it has been held, as against collateral attack." 22 Cal. Juris., sec. 51, page 468.
>
> "Applicant or petitioner must allege and establish facts sufficient to justify the court in appointing a receiver. The allegations and proof must be clear and positive." 19 C. J. S., page 1531.

We repeat that in the petition now under the consideration of this court nothing else is stated but the conclusion or the opinion of petitioner that a receiver should be appointed. Facts are not alleged upon which the exercise of the court's discretion could be based, nor is the necessity or convenience of the appointment of a receiver shown in the petition.

> "The application for a receiver whether based on the bill or on separate affidavits, must show the *necessity* for the appointment, including the want or inadequacy of other remedies. . . ." 8 Fletcher, sec. 5272.

We have stated that the petition does not state facts or reasons upon which a pronouncement as to the necessity or convenience of such an appointment could be made. Let us now consider the importance of this omission. Although one of the fundamental deficiencies of the petition is that it does not inform the court for what reasons petitioner requests the appointment of a receiver, we shall assume *arguendo* that this appointment is requested so that the receiver may proceed to wind up the affairs of the corporation inasmuch as the government seems to contend that something remains to be liquidated, and so that the receiver may dispose of the properties in some manner which due to the silence

and insufficiency of the motion is only known to the petitioner. Under this theory or hypothesis the court would have to decide a question of extreme importance, to wit, that of leaving the liquidation to those who were officers and directors of the extinct corporation or depriving them of so doing by entrusting the same to a judicial administrator.

Section 28 of our Corporation Act provides as follows:

> "Upon the dissolution in any manner of a corporation, the directors shall be the trustees thereof pending the liquidation, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, so far as such moneys and property shall suffice."

Section 30 of the same Act, as does section 183 of the Code of Civil Procedure, gives the court power in its discretion to appoint a receiver to carry out the liquidation but only upon application of creditors or stockholders. That is to say, according to our laws the liquidation of a corporation is made by the directors acting as trustees in dissolution, but the courts may exercise their discretion and entrust the liquidation to a liquidator or to a judicial administrator if so requested by some creditor or stockholder.

In 1 Tardy's Smith on Receivers, sec. 316, page 780, we find the following comment on legislation of this nature:

> "The aversion of courts of equity to taking the control of property out of the hands of the real owners and placing it in the hands of an officer of the court applies to the business of winding up the affairs of a dissolved corporation as fully as to any other situation. In many states it is provided that upon dissolution, the corporation shall continue to function as such, for a limited time, for the purpose of winding up its affairs. In other the directors in office at the time of the dissolution have the statutory duty of caring for the liquidation.
>
> "In practically every state some statutory authority, not

nominated by a court and composed of persons directly interested in the property, is furnished for this purpose. It is the general rule that courts will not displace these statutory liquidators by receivers, unless some statute imperatively so requires, or it be shown that such trustees are guilty of gross fraud or abuse of their trust in their liquidation actions. This statement is true even with reference to dissolution brought about, at the instance of the state, as a punishment for violation of a regulatory statute. The state may be interested in the matter as to whether or not a corporation shall continue in business; in fact the state may be the only party entitled to raise the question. But after dissolution has occurred, the state, generally, has no interest in what happens to the assets of the concern.

"In order to have a receiver appointed in preference to the statutory liquidators in case of the dissolution of a corporation, no matter what may be the cause of the dissolution, there must be a showing that such liquidators are violating their trust and that the property of the corporation will not be preserved without the appointment of a receiver."

If as contended by The People of Puerto Rico something remains to be liquidated and to be disposed of, which we, of course, deny, what allegations or evidence has the court before it to decide that the liquidation or the disposal of the property should be entrusted to a receiver and not to those interested in the company which was dissolved by a decree of this court? This is a conclusive example of the insufficiency of the motion, and because of that, assuming that, what of course we deny, The People of Puerto Rico may ask for the appointment of a receiver and that the court has jurisdiction, it could not exercise its judicial discretion because such jurisdiction was not invoked in due form.

In *Schluter* v. *Texidor, supra*, the court said:

"We agree with the respondents that the appointment of a receiver rests in the sound discretion of the court, but always

when the jurisdiction has first been properly invoked. Indeed, we doubt whether in this case, supposing there has been a formal compliance with the requisites of equity jurisdiction, the situation clearly calls for a receiver. We have a fairly elaborate Code of Commerce providing for the liquidation of a dissolved partnership, and there is no averment that the partners, who are also made liquidators in the articles of partnership, are incompetent or that they should be deprived of the administration. If we read the authorities right, part of the fundamental idea in the non-interference of equity is that the debtor ought to be allowed to handle his own property and manage his own debts until some very good reason to the contrary is shown."

It is alleged in the answer to the motion that "the judgment of the court has been complied with." The corporation has been dissolved, its obligations have been extinguished and it has disposed of its property by the unanimous consent of the stockholders and trustees in liquidation". The Government, however, contends that the extinct Rubert Hnos., Inc., should be dissolved by a receiver and that the disposal of its properties should also be carried out by a receiver. There is no allegation or proof of any kind that such an appointment is necessary. And if we were mistaken and there still exists something to liquidate or to dispose of, what basis, what data, what information is furnished by the motion so that the court may decide that this should be done by a receiver or by those who, under the law, and until there is no valid order to the contrary, have full power to carry out the liquidation?

To sustain a motion as that now before this court in which, as we have said, petitioner merely expresses its opinion that this or that should be entrusted to a receiver, would be to establish a precedent contrary to all those now existing on the subject, to revoke doctrines firmly established by this court for years, which rest on sound principles and practically to declare that the ap-

pointment of a receiver may be obtained without any allegations or proof as to the necessity of a remedy which should always be granted with great caution and only when it is clearly justified.

II.

This Court has no Jurisdiction to Appoint a Receiver because the Quo Warranto Proceeding is Not Pending.

This case was terminated when the judgment of this court was affirmed by the Supreme Court of the United States. Inasmuch as the case is not now pending this court lacks jurisdiction to appoint a receiver. Section 182 of the Code of Civil Procedure provides:

"A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or jointly interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

"2. After judgment, to carry the judgment into effect.

"3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

"4. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

"5. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Petitioner's contention is that the motion is based on subdivisions 4 and 5 and should be sustained in view of the provisions of said subdivisions.

This court has said that section 182 is copied almost literally from section 564 of the Code of Civil Procedure of California. *Schluter* v. *Texidor, supra; Nevarez Brothers* v. *District Court*, 36 P.R.R. 323. The construction which the California courts have given to section 564 is therefore of great value and importance in the construction of section 182 of our Code of Civil Procedure. According to this section a receiver may be appointed by the court in which an action is pending or has passed to judgment. Section 348 of the Code of Civil Procedure defines what is understood by a pending action as follows:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

The Supreme Court of Puerto Rico in *Morales* v. *Cruz Velez*, 36 P.R.R. 216, referring to sections 91 and 348 of the Civil Code of Procedure has said:

> "Construing the two articles together we feel bound to hold that an action is still pending until an unappealable judgment arises."

The judgment rendered by the Supreme Court of the United States affirming the judgment rendered by this court against Robert Hermanos, Inc. is an unappealable judgment. The case therefore is not pending but terminated, and if the motion is based on the provisions of section 182 authorizing the appointment of a receiver in the court where an action is pending, it is clear that this court lacks jurisdiction to make the appointment.

In *White* v. *White*, 130 Cal. 597, a receiver was appointed while an action for divorce was pending and after judgment was rendered the receiver was authorized to sell certain properties.

The Supreme Court of California reversed the order of the court saying:

"The judgment in the case is not in any way affected by the provision as to the receiver. The receiver had not taken possession of any property; and the object of his original appointment, and the functions originally vested in him, terminated with the entry of the judgment. Any new duties conferred upon him by the judgment were in excess of the jurisdiction of the court, whose power to appoint a receiver exists only in the cases prescribed by the Code of Civil Procedure, section 564—of which this is not one. (*French Bank Case*, 53 Cal. 495.) The power under subdivision 3 (a new provision of the code) to appoint a receiver 'after judgment to carry the judgment into effect', applies only to cases where the judgment affects specific property—as in *Guy* v. *Ide*, 6 Cal. 101; *Hill* v. *Taylor*, 22 Cal. 191, and other cases cited in the annotated Code of Civil Procedure, section 564. The provision has no application to a simple money judgment; in such case the writ of execution furnishes an amply sufficient remedy, and is the only means provided. (Code Civ. Proc., secs. 682, 684.) The judgment here can only be regarded as an ordinary money judgment.

"The judgment rendered was a final adjudication of the rights of the parties, and was conclusive not only as to the relief granted but at to the relief denied or withheld. (Code Civ. Proc., sec. 1908.) Upon its entry the jurisdiction of the court over the subject matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute. By section 1049 of the Code of Civil Procedure, the cause had then ceased to be pending in the court, and the court was without jurisdiction to render any further judgment therein.' (*Bracket* v. *Banegas*, 99 Cal. 627; *Carpentier* v. *Hart*, 5 Cal. 406; *Bell* v. *Thompson*, 19 Cal. 706; 2 notes to California Reports, 130; Freeman on Judgments, secs. 141, 142; 1 Black on Judgments, sec. 306.) 'After final judgment

any further judgment, or order materially varying the judgment, is a mere nullity. (*Barry* v. *Superior Court*, 91 Cal. 486; *In re Barry*, 94 Cal. 562; *Hubbard* v. *Moss*, 65 Mo. 647; *Ross* v. *Ross*, 83 Mo. 100.)

"Doubtless the court may in its judgment provide for further action in order to furnish complete relief. But in such cases the judgment, as to such matters, is not final. Here there was no provision of the kind, and the judgment was final as to all matters involved. The order complained of was not designed to carry into effect the judgment rendered, but is in effect a new adjudication in the nature of a decree of foreclosure depriving the plaintiff of property held by him under constitutional guaranties, and of which he cannot be deprived without due process of law."

In *Havemeyer* v. *Superior Court*, 84 Cal. 327, the Supreme Court of California said as follows:

"The conclusion which inevitably follows from these views is, that, in an action under sections 802 *et seq.* of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commended by a creditor or stockholder of the corporation. (Code Civ. Proc., sec. 565.)"

We have noted that the first paragraph of section 182 of the Code of Civil Procedure refers to the appointment of a receiver in a pending action or in one which has passed to judgment. We have shown that this is not a case in which a receiver may be appointed under the theory that an action is pending. Let us now consider if a receiver can be appointed on the ground that the present action has passed to judgment.

Only in two cases of those provided for in section 182 of the Code of Civil Procedure can a receiver be appointed after judgment, to wit, in the two cases expressly mentioned in the statute

and these are the ones comprised in subdivisions 2 and 3 of said article. Section 564 of the Code of Civil Procedure of California, which this court has stated is almost a literal copy of section 182 of the Code of Civil Procedure, provides as follows:

"Section 564.—Appointment of Receivers.—A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

"2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

"3. After judgment, to carry the judgment into effect;

"4. After judgment, to dispose of an appeal, or in proceedings in aid or to preserve it during the pendency of an appeal, or in proceedings in aid of execution when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

"5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

"6. In an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction;

"7. In all other cases where receivers have heretofore been appointed by the usages of courts in equity."

It is well settled in California that in accordance with the provisions of section 564 of the Code of Civil Procedure of said State there are only two provisions which authorize the appointment of a receiver after judgment, to wit those contained in subdivisions 3 and 4 of said section which are identical to subdivisions 2 and 3 of section 182 of our Code:

> "There are but two statutory provisions authorizing the appointment of a receiver after judgment. Subdivisions 3 and 4 of section 564 of the Code of Civil Procedure." (22 Cal. Juris., sec. 33, page 451.)

And it is to these two subdivisions, and to them only, that paragraph 1 of section 182 refers when it provides that a receiver may be appointed in an action which has passed to judgment.

The first paragraph of section 564 of the Code of Civil Procedure of California refers to an action which is pending, but not to an action which has passed to judgment, whereas the first paragraph of section 182 of our code mentions both cases. This, it is submitted, makes all the more clear our contention that only subdivisions 2 and 3, which expressly so provide, authorize the appointment of a receiver after judgment. The legislature of Puerto Rico included the words "or has passed to judgment" to harmonize the first paragraph of section 182 with the subsequent provisions of said section. In other words, it is evident that the words of the first paragraph with regard to pending actions refer to subdivisions 1, 4 and 5, and the words "or has passed to judgment" refer to subdivisions 2 and 3 which expressly provide for the appointment of a receiver after judgment.

Leaving aside the fact that the petitioner's motion is based expressly on subdivisions 4 and 5, it is obvious that subdivisions 2 and 3 would be and are inapplicable. The doctrine in California is that subdivision 3 of section 564 of the Code of Civil Procedure of said State which authorizes the appointment of a receiver "after judgment, to carry the judgment into effect" applies only when the judgment affects specific property.

"A receiver may be appointed after judgment, to carry the judgment into effect, unless the execution thereof has been stayed by proper bond. This code provision applies only where the judgment affects specific property." 22 Cal. Juris. sec. 34; page 452; *White* v. *White*, 130 Cal. 528.

With regard to subdivision 3 it is obvious that the same can not be invoked for the purpose of the appointment of a receiver in this case inasmuch as there is no property to dispose of in accordance with the judgment in view of the fact that the judgment makes no provision whatever with regard to defendant's properties. Nor is there any need of preserving property during the pendency of an appeal. Nor is this a case involving proceedings in aid of execution when an execution has been returned unsatisfied.

III.

This Court lacks Jurisdiction to Appoint a Receiver in a Quo Warranto Proceeding; it can Not Appoint a Receiver upon Petition of The People of Puerto Rico. Once a Corporation has been Dissolved by Decree of a Court in a Quo Warranto Proceeding a New Proceeding must be Instituted by a Creditor or Stockholder in Order that the Court may Acquire Jurisdiction to Appoint a Receiver.

Sections 27 and 28 of the act entitled "An Act to establish a law of private corporations" establishes the normal procedure for the dissolution of a corporation regardless of the cause of its dissolution; said sections authorize the directors of the corporation as trustees to do all that is necessary to effect its liquidation and they are charged with the payment of all the obligations of the corporation and the division of the remaining assets among the stockholders.

The appointment of a receiver to deprive the directors of the corporation of the possession of the properties of the corporation deprives said directors of their right and authority to carry out the dissolution and distribution of the assets and constitutes a violent

alteration of the normal and orderly process of dissolution. In any case, it would mean considerable expense which would have to be deducted from the available assets to be divided among the stockholders.

In the present case, and under the hypothesis that there is something to liquidate, it would mean the imposing of a much more serious penalty than those imposed by the judgment of this court. Not only would it produce all the consequences graphically pointed out by the Supreme Court of California in *Havemeyer v. San Francisco Superior Court*, 84 Cal. 327, but also consequences of perhaps equal gravity for the landowners who were "colonos" of defendant corporation and those persons and entities with whom said corporation had contracts of undoubted validity.

Such penal consequences do not arise from the corporation act, nor from the penal code nor from any other substantive statute, but rather, according to petitioner's theory, from adjective law, a law of civil procedure, section 182, which was approved some seven years before the approval of the private corporation act.

It would seem very strange that said penalties, were it the intention of the Legislature to impose them by virtue of the provisions of section 182 of the Code of Civil Procedure, were to be found in a purely procedural statute, and the inclusion of penalties in a statute of this nature would violate the provisions of the Organic Act of Puerto Rico because the title of the Code of Civil Procedure gives no notice that in said code penalties would be provided for, and such provisions would not be germane to the nature of the legislation announced by said title.

It is true that in Act No. 47, approved on August 7, 1935, provision was made, among other penalties, for the confiscation of the property of a corporation found guilty of possessing or controlling real property in excess of the limit fixed by the Joint Resolution of Congress, or its sale at public auction—and the sale of the property at public auction is exactly what the receiver entrusted with the liquidation would proceed to do—but in accord-

ance with section 6 of the Quo Warranto Law, as amended by section 2 of said Act No. 47, said penalty must be provided for in the judgment which is rendered and the price of the sale must be fixed in said judgment. In the judgment rendered in this case the court did not impose such a penalty nor did it order a sale at public auction.

But it is not true that by section 182 of the Code of Civil Procedure the Legislature of Puerto Rico intended to impose penalties or authorize The People of Puerto to petition for the appointment of a receiver in a quo warranto proceeding. And incidentally we may add that section 182 had the same meaning before as it had after the approval of Act. No. 47 of 1935.

The Supreme Court of California has carefully examined, analyzed and construed provisions similar to those contained in section 182 of our Code of Civil Procedure in an opinion written by one of the most distinguished jurists of America, Justice Beatty, the Chief Justice of said Court. The case referred to is *Havemeyer* v. *San Francisco Superior Court*, 84 Cal. 327. The statutory provisions there studied and construed are: Section 564 of the Code of Civil Procedure of California, identical to section 182 of the Code of Civil Procedure of Puerto Rico; section 565 of the Code of Civil Procedure of California, the same as section 183 of the Code of Civil Procedure of Puerto Rico, and section 400 of the Civil Code of California, substantially the same as section 28 of the Private Corporations Act of Puerto Rico.

We copy extensively from said opinion not only because it discusses and analyzes statutory provisions the same as those in force in Puerto Rico, but also because this case contains the best study and discussion on the subject which we have been able to find. With regard to this case, the distinguished commentator, Pomeroy, in his "Pomeroy's Equity Jurisprudence", 4th Edition, pages 3643, 3646, says:

> "The opinion of Beatty, C. J. in *Havemeyer* v. *Superior Court*, 84 Cal. 327, 342–389, 18 Am. St. Rep. 192, 10 L.R.A.

627, 24 Pac. 121, is by far the longest and most elaborate to be found in any report on the subject of the appointment of receivers of corporations."

In section 1548, pages 3642 and 3643, of the same treatise under the title "Receivers Authorized by Statutes", the author copies and incorporates in the text of said opinion the following:

"The remarks of a very able judge in description of this legislation may be of interest: 'In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property (of a corporation that has ceased to exist). But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts and distribute the surplus pro rata to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture, and reversion; in others, of committing the administration to other courts than courts of equity; in others to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded

by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is, from beginning to end, no suggestion of added penalties or punishment after death."

The Supreme Court of California referring in the *Hatemeyer* case to the order appealed from appointing a receiver and to the opinion of the court which had entered said order, says:

"It will be seen, by reference to the opinion of the superior court, above quoted, that the provisions of section 564 of the Code of Civil Procedure, to the effect that a receiver may be appointed when a corporation has forfeited its charter, is construed to mean that in such case a receiver must be appointed, and this because the public has an interest that the power should be exercised. To our minds it is perfectly clear that the true construction of this clause of section 564 is found in the very next section of the code, wherein it is specifically enacted that 'upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers', etc. Here is an express enumeration of the parties, and the only parties (expressio unius est exclusio alterius), whose interest demands that *may* should be read *must;* and considering this language in connection with section 400 of the Civil Code, which, as we have seen, provides that the directors in office at the date of its dissolution shall settle the affairs of a corporation, unless some other persons are appointed, we should never have thought of looking further for a definition of the circumstances under which a receiver could be appointed. In terms, both sections apply as well to cases of involuntary as to cases of voluntary dissolution, and they do in fact provide a most salutary rule for

the protection of all persons interested in the property. But it is held that they must be construed out of their obvious sense, and limited in their application to cases of voluntary dissolution, because, and only because, in cases of forfeiture for corporate misconduct, the stockholders cannot be adequately punished or restrained without the intervention of a receiver, and, consequently, that the interest of the public, in the imposition of such punishment and restraint, requires the conversion of 'may' into 'must' thus making the appointment of a receiver obligatory in all cases of forfeiture.

This proposition, which is, in effect, stated in the opinion above quoted, is much more plainly and directly put in the argument made by the respondent here. He asks if it is possible that this controversy between the state and a concern with millions of capital is limited to the imposition of a fine of five thousand dollars, and the cancellation of a charter the duplicate of which can be obtained while we are talking here, and he answers his own question as follows:

'I understand the great interest of the state is to break down the monopoly. To do that, it seizes the means and utensils,—the business with which the monopoly has been proceeding. It scatters it. It divides it up. A receiver is appointed for that purpose. That is part of the penalty. That is a part of the penalty provided by law because they have forfeited their corporate rights,—no other reason.'

Translated into terms specifically applicable to the case before us, the meaning of this is, that if a corporation organized for the purpose of refining sugar enters into a combination with other corporations, through the medium of what is called a trust, for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not only forfeit its charter and impose the utmost fine which the law prescribes for such offenses, but they must go further, and by the hands of a receiver seize into their possession all the property of the defunct corporation, and especially its

sugar-refining plant, not for the purpose of preserving and protecting it, and as speedily and economically as possible distributing it to those who are equitable entitled, viz., creditors and stockholders, but for the quite opposite purpose of shutting it up and condemning it to rust and idleness until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine, and one which does not, upon any ground, commend itself to our judgment.

"It may not be the rule in this state to construe penal legislation strictly, but even here, when a court is asked to impose a penalty for infraction of a law, the first inquiry is, What penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes, but in the express term of the act defining the offense.

"Now, what is the case here? In section 803 of the Code of Civil Procedure, the legislature has enjoined upon the attorney general the duty of bringing actions for the forfeiture of corporate franchises whenever he has reason to believe that they are unlawfully held or exercised. This was his sole authority for bringing his quo warranto against the American Sugar Refinery Company, and it is upon this chapter of the code that the judgment of forfeiture depends. Section 809, in the same chapter, defines the character of the judgment that must be rendered when the defendant is found guilty, viz., that the defendant be excluded from the franchise it has abused, and 'the court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.' This is absolutely all the punishment that the legislature has in terms prescribed; and if any other was intended, especially if such other punishment was designed to be severe beyond comparison with that expressly defined, it is passing strange that the courts should have been left to

work it out by a doubtful construction of other parts of the codes.

"But, to our minds, the gravest objection to the doctrine lies in the consequences which it involves. Obviously there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works; however vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership; for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property and again putting it into the combination. It must, therefore, be divided up and scattered, and its value in great measure destroyed. The stockholders, when they finally realize upon their property, must be content to receive, not the proceeds of a well-appointed manufactory in complete running order, but the price of a lot of old iron and second-hand machinery, sold in lots according to the discretion of a receiver, acting with a view, not to their interest as stockholders, but solely with a view to the interest of the public in punishing them.

"We cannot assent to a doctrine involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation. Its judgments in such case, beside being wholly unauthorized, would always operate as bills of attainder or

ex post facto laws, both of which are not only abhorrent to our ideas of justice, but are expressly forbidden by our charters of government." Pages 374, 379.

"The conclusion which inevitably follows from these views is, that in an action under sections 802 et seq. of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation. (Code Civ. Proc., sec. 565.)

"Such new and distinct proceeding upon the part of the beneficiaries, or some of them, is the essential condition of any jurisdiction in the court to take the property out of the control of the trustees designated by law. (Civ. Code, sec. 400.) An order appointing a receiver without such application is, therefore, void, not only as to strangers to the quo warranto, but is even void as to the corporation and its stockholders and vendees." (Page 380.)

In *State Investment and Insurance Co.* v. *San Francisco*, 101 Cal. 135, the proceeding was instituted by an information filed by the Attorney General in the Superior Court for the People of the State of California against the above-named corporation under the provisions of section 601 of the Political Code of California. In this proceeding petitioner prayed for judgment decreeing the dissolution of the corporation, its liquidation and the distribution of its assets.

The court rendered judgment in accordance with the prayer of the information and the said judgment also appointed a receiver of all the property of defendant corporation providing that said receiver should take possession of said property, liquidate the corporation, and distribute its property and effects.

Defendant corporation appealed to the Supreme Court of California and also applied for a writ of prohibition.

The Supreme Court held that the appointment of a receiver was invalid, stating that the jurisdiction of the Superior Court to decree the dissolution of a corporation existed only by virtue of statutory authority and that it did not possess such authority under its inherent general equity jurisdiction, and that since its jurisdiction derives from the statute, it is limited by the same with regard to the conditions under which such jurisdiction may be invoked as also with regard to the judgment that it may render. It is also held that said section of the Political Code did not authorize the appointment of a receiver. The court held finally that the appointment of the receiver was not authorized by the provisions of the Code of Civil Procedure (sections 564 and 565). The court said:

> "The only parties to the present action are the people of the state and the delinquent corporation. When the object for which the action is authorized—the revocation by the state of the franchise which it conferred—has been accomplished, there would naturally be no further action for the court to perform. The state has no interest in either the assets of the corporation or its debts, and when it has secured the dissolution of the corporation its functions in the action have ceased. (See *People v. Buffalo Stone Co.*, 131 N.Y. 144.) The statute does not authorize either the attorney general or the insurance commissioner to exercise any further direction or control in the affairs of the dissolved corporation, or in the distribution of its assets; nor has the state or any of its officers any interest in having the creditors receive from the assets of the corporation the amounts in which it may be indebted to them; and it is no concern of the state how or when the assets of the corporation shall be divided between the stockholders. Notwithstanding the decree of dissolution, the property still belongs to the stockholders, and the right to wind up the affairs of the corporation and to distribute its effects is given by the statute to the directors, and they can be deprived of this control over the property

of the corporation only at the instigation of a creditor or stockholder."

Other decisions of the Supreme Court of California, among them, the *Peoples Home Sav. Bank* v. *Superior Court*, 103 Cal. 27, state the same rule and construe in like manner the aforementioned sections of the Code of Civil Procedure.

In *Murray* v. *American Surety Co. of New York*, 70 Fed. 341, the Circuit Court of Appeals for the 9th Circuit held that the appointment of a receiver in a proceeding instituted under the California Bank Commissioners Act was invalid, and that the court had no jurisdiction to make such an appointment. The court in holding that sections 564 and 565 of the Code of Civil Procedure of California did not authorize the appointment stated the rule applicable to all statutory proceedings in the following words:

> "In whatever light this question may be viewed, we are brought directly face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself."

When the statute does not so provide, a court has no power to appoint a receiver in quo warranto proceedings upon petition of the people or the state. *Yore* v. *San Francisco Superior Court*, 108 Cal. 431; *Commonwealth* v. *Order of Vesta*, 156 Pa. St. 531; 27 Atl. 14; *In re Fraternal Guardians Assigned Estate*, 159 Pa. 603; *State* v. *West Wisconsin R. Co.*, 34 Wis. 197; *Jackson Loan & Trust Co.* v. *State*, 101 Miss. 440, 56 So. 293; *Weatherby* v. *Capital City Water Co.*, 115 Ala. 156; 22 So. 140.

IV.

Apart from the Reasons Already Stated the Appointment of a Receiver Does Not Lie because the Judgment has been Complied with, and Appointment of such a Receiver Would Have no Purpose or Objective Whatever.

Defendant corporation was dissolved by virture of the judgment rendered by this court. In other words, in order to dissolve

said corporation there has never been any need of the appointment of a receiver. Moreover, on March 28, 1940, the stockholders of Rubert Hermanos, Inc., delivered to the Executive Secretary of Puerto Rico a document which in part reads as follows:

> "The undersigned being all the stockholders of the corporation Rubert Hermanos, Inc., desiring to comply with the judgment of the Supreme Court of Puerto Rico in Case No. 2 entitled The People of Puerto Rico *v.* Rubert Hermanos, Inc., quo warranto, rendered on July 30, 1938, a copy of which is attached hereto, hereby request the Executive Secretary of Puerto Rico to take notice of the dissolution of said corporation."

The fine, costs, and attorney's fees have been paid. The corporation was liquidated by conveying all its properties to a partnership organized and composed of those who were its only stockholders and in effect the owners of said property. It was considered that this was the only feasible, legal and economically sound method of effecting the dissolution and liquidation of the corporation so as to avoid serious and unnecessary injuries to the stockholders. The People of Puerto Rico had notice of the conveyance of all these properties before they requested that a date be set for the hearing of its motion for the appointment of a receiver.

It is obvious therefore that the appointment of a receiver can serve no purpose whatever to effect the dissolution, liquidation or disposal of the properties of defendant corporation.

> "It is ground for refusal that no good can be accomplished by the appointment of a receiver." 8 Fletcher, page 8884, sec. 5261.
>
> "A receiver will not be appointed where not necessary . . ." 8 Fletcher, page 8883, sec. 5260; *City of Cape May* v. *Cape May, D.B. & S.P.R. Co. et al.*, 59 N.J.E. 59; 44 Atl. 973; *Barton* v. *Enterprise Loan & Bldg. Ass'n. Of Wabash*, 114 Ind. 226; 16 N.E. 486.

Certainly The People of Puerto Rico could not seriously contend that this court should decree the appointment of a receiver to take over property which no longer belongs to the extinct corporation and which has been acquired by a third party who is not before the court, even though said party consists of a partnership which was organized and is composed of those who were the stockholders of Rubert Hermanos, Inc., and particularly when the motion requesting the appointment does not state the reasons why the appointment is requested and merely states petitioner's opinion to the effect that the appointment should be made for the purpose of disposing of the extinct corporation's property. *Havemeyer* v. *Superior Court*, 84 Cal. 327; *People* v. *O'Brien*, 111 N.Y. 163, 2 L.R.A. 255, 268; *Weatherby* v. *Capital City Water Co.*, 115 Ala. 156, 22 So. 140.

In view of the foregoing reasons it is respectfully prayed that the motion for the appointment of a receiver be overruled.

San Juan, Puerto Rico, July 5, 1940.

Respectfully submitted,

JAIME SIFRE, JR.,
HENRI BROWN,
Attorneys for the Defendant.

Served with copy this fifth day of July, 1940.

MIGUEL GUERRA-MONDRAGON,
Attorney General of Puerto Rico.

[Title omitted.]

REPLY OF THE PEOPLE OF PUERTO RICO TO DEFENDANT'S BRIEF

REGARDING THE APPOINTMENT OF RECEIVER.

[Filed July 16, 1940.]

The points in regard to which The People of Puerto Rico do not agree with defendant, Rubert Hermanos, Inc., because of their importance are the following:

(a) With reference to the statutes applicable to this incident.
(b) With reference to the value of the doctrines propounded in the case of *Havemeyer* v. *Superior Court*, 84 Cal. 327; and
(c) With reference to the sufficiency of the motion by The People of Puerto Rico praying for a receivership.

The other questions argued by defendant are of a secondary nature and are practically involved in the above-mentioned points.

(a).

With reference to the applicable statutes.

The fundamental discrepancies between The People of Puerto Rico and the defendant are with reference to these first points. The defendant does not distinguish between the dissolution of a corporation "in any form agreed upon" (Article 28 of our Corporation Law, page 8 of complainant's brief) and the forfeiture of a franchise of a corporation. Dissolutions are governed by the provisions contained in Section VI, "Dissolution", Articles 26 and 33 of the Private Corporations Act (Commercial Code, ed. 1932, p. 352). On the other hand the Law of Private Corporations does not contain any provision applicable to the immediate cessation of the corporate life as a consequence of the forfeiture of a franchise. Sub-paragraphs 4 and 5 of Article 182 of the Code of Civil Procedure are the only laws in force which relate to the corporate death.

The existence of an essential and profound distinction between the dissolution and corporate death appears immediately upon a reading of the wording of our statutes. Article 28 of the Corporation Law cited by defendant, when it says "Upon the dissolution of a corporation in any form agreed upon, the directors shall be the trustees . . .", excluding all notion or idea of corporate death decreed in a quo warranto proceeding and is, for that reason, inapplicable. To "agree" in accordance with the dictionary of the Spanish language has the same meaning as "determine or decide in accord or by a majority vote". The forfeiture of a franchise

arises from the fault or delinquency of the corporation and it may not be agree or determined in any form by the directors or by the stockholders. And finally, sub-paragraph 4 of Article 182 of the Code of Civil Procedure recognizes the existing difference between the dissolution and the forfeiture of a corporate franchise, inasmuch as the text treats them as these things or situations.

> "In case when a corporation has been dissolved . . . or has forfeited its corporate right."

This distinction between dissolutions and corporate death which today appears clean and clear in our laws has very remote precedence. In the State of New York, where the doctrines and principles which now occupy us were promulgated for the first time as positive right, such distinction was observed from ancient times. So, in 1887 Judge Earl, in *Herring* v. *New York, L. E. & W. R. Co.*, 12 N.E. 763, 781, bequeathes to us the following illustrative data of the procedure which was followed in that jurisdiction to decree a forced liquidation of a corporate entity:

> "The other was a proceeding instituted by writ of quo warranto by the attorney general after leave obtained of the court, which was a proceeding at law in which the corporation was entitled to a jury trial; and in that proceeding judgment could be rendered dissolving the corporation, but the supreme court had no right to appoint a receiver. But, after final judgment annulling and dissolving the corporation, the attorney general was required to apply to the court of chancery for the appointment of a final receiver, and his powers and duties were regulated by the provisions contained in Article 3 above referred to in reference to the voluntary dissolution of corporations. These two systems of procedure against corporations went along side by side—one in chancery; the other at law."

Resuming (1) a quo warranto proceeding before a court of law, with a right to a trial by jury; (2) appointment of a liquidator by

a court of equity with the same powers as those provided by statutes for cases of voluntary dissolution. From all this two valuable consequences are derived, to wit: (a) that it was the custom of courts of equity to appoint liquidators for defunct corporations; and (b) that it was not permitted to the directors of a defunct entity to participate in a liquidation as was the case in all cases of voluntary dissolution.

At all times the American courts have laid stress on these fundamental differences, a matter which seems strange considering the clearness of the statutes and, therefore, the little or entire lack of necessity of doing so.

In 1899 Judge Flay of the Court of Appeals of Texas (*San Antonio Gas Co.* v. *State*, 54 S.W. 289, 294), punctualized the various situations to which the law makes reference:

> "That the statute draws a distinction between a dissolution and the forfeiture of a charter is shown by the language of section 3, art. 1465, Id., where provision is made for a receiver in case of dissolution, insolvency, or forfeiture. When a charter is forfeited, the life of a corporation ceases, and no president and board of directors can survive it, and, unless specially authorized by statute, could not by virtue of their offices, take control of the property of the corporation. If article 682 could apply to cases in which there has been a forfeiture of a charter by the state, it can only apply when no receiver has been appointed by some court of competent authority. If it be necessary to justify the power given by statute, it may be well to remember that appellant in this case is a quasi public corporation, and for the protection of the public interest it was necessary that a receiver should be appointed."

In 1908 the presiding Justice of the Supreme Court of the State of Washington, Mr. Hadley—*Conlan* v. *Oudin*, 94 P. 1074—again distinguishes between a voluntary dissolution and the forfeiture of corporate franchises:

"Appellants contend that, under the terms of section 4274, Ballinger's Ann. Codes & St. (Pierce's Code, sec. 7075), the persons who are trustees of a corporation at the time of its dissolution become the trustees of the stockholders and creditors, with full power and authority to settle up the affairs of the corporation and distribute the proceeds of the state among the stockholders. We think, it was the evident intention of the Legislature to apply the provisions of section 4272 to cases of voluntary dissolution, the procedure for which is outlined in section 4275 (section 7076). Such a dissolution is effected by a vote of two-thirds of all the stockholders at a meeting called for that purpose, followed by certain prescribed procedure in court. In considering the matter from the legislative standpoint it was doubtless believed that, in cases of voluntary dissolution, there is ordinarily sufficient unity of purpose to make the former trustees proper and desirable administrators of the corporate estate. The dissolution in the case at bar was not a voluntary one effected under the above statute."

And nearer to our day, in 1924, the Judge of the Supreme Court of Ohio, Mr. Allen in *State* v. *Municipal Saving & Loan Co.*, 144 N.E. 736, 738, repeats the said distinction:

"The instant appointment is not a case of consent of the parties . . .

"Nor does this case arise under section 11944, General Code, which in part reads:

"'A director, trustee, or other officer of the corporation, or any of its stockholders, may be appointed a receiver.'

"This section is a part of the chapter entitled, 'Dissolution of Corporations' and refers only to cases of voluntary dissolution of a corporation. The instant case, however, is not one of voluntary dissolution. Hence this is not an action in which under the statutes it is permissible to appoint a

director, trustee, or other officer of the corporation, or a stockholder as receiver."

The cases in which the court has taken for granted the existing distinction between voluntary dissolution and corporate death and has acted upon them without any statement are naturally very numerous.

Having pointed out and discussed even to the point of redundancy this difference, the only thing left for us is to repeat that the jurisdiction of the court to take action on this difference arises in an affirmative manner from the clear terms of the existing law:

"In case when a corporation . . . has forfeited its corporate rights."

Under these circumstances, the corporate franchise of the defendant's entity having been forfeited, we do not see how the authority of this court to grant the petition of the people can be seriously put in doubt.

"The state expressly authorized the appointment of a receiver in the event that judgment was rendered against the corporation. The judgment in case of a forfeiture is that the franchise be seized into the hands of the state, and that the corporation be dissolved. 2 Kent. Comm.; *President, etc., of Bank of Vincennes* v. *States*, 1 Blackf, 267; *Ryan* v. *Vanlandinghan*, 7 Ind. 416. The appointment of a receiver to take possession of the property of the company was necessary, and, in the exercise of its general powers, we think the court was authorized to make such appointments. It was asked for in the information, and no harm could result from the appointment as a part of the proceedings in the cause. Had it not been made until after judgment, the court would doubtless have had the right to make the appointment on the motion of the prosecuting attorney, and without further notice. A correct result having been reached, we do not think

the action of the court should be disturbed, or that any reason exists for a modification of its judgment. Judgment affirmed." *Eel River Co., etc.*, 57 N.E. 388, 398.

(b)

With reference to the value of the doctrines propounded in the case of *Havemeyer* v. *Superior Court*, 84 Cal. 327.

The jurisprudence of the State of California, notwithstanding the repeated statements of the defendant (see pages 4 and 14 of its brief), in this case has no persuasive value whatsoever. It is observed that Article 182 of our Code of Civil Procedure "follows substantially, if not literally, the California statute", (*Schiuter* v. *Texidor*, 26 P.R.R. 97, 114); but the same thing may also be said substituting California for Texas, Washington, Mississippi, Kansas or by other States. The fact is that the original statutes with reference to receivership were promulgated in the year 1825 in the State of New York and that said statutes were subsequently copied in other jurisdictions. In 1829 New Jersey copied them, Illinois, Ohio, Delaware, etc., followed thereafter.

In the work of Clark On Receiver, vol. 2, pages 1062 and 1063, the history of these legal provisions are explained:

"'The Indiana, Idaho and other Civil Codes have followed the old New York Statute on the subject of receivers, but have changed the old New York sub-section 4, of section 244, to suit the exigencies of their states, the substance of their statutes being as follows:

"'5. When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.'

"

"The State of California adopted a Code of Civil Procedure patterned after the New York Code. Subsection 4 of the New York Code became the substance of subsection 5 of section 564 of the California Civil Code of Procedure

Subsection 5 of California Civil Code of Procedure was and is as follows:

"'5. In the cases where a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.'"

The literal analogy of the statutory provisions in force in the majority, if not in all the States of the Union, is explained by the ancient sanction of the principles and doctrines in which they were incarnated.

We, therefore, do not find any reason why preference should be given to the California decision. Our Article, for example, could have been very well copied from the State of Idaho inasmuch as in accordance with the opinion of the deceased Justice MacLeary, the local procedure originated in that place.

"Our present code of Civil Procedure . . . was adopted from the Code of Idaho, which is a State in which the author of said Code had previously resided." *MacCormick et al.* v. *Molinary et al.*, 16 P.R.R. 389.

Under these circumstances, the persuasive force of the different opinions should depend exclusively upon the justice and the good sense of their reasonings and not the place on which the court sits:

"Perhaps as the statute is the same we should give attention to the interpretation given by California in preference to those of other States. But we have come to our own conclusion based upon the fact that the letter of the law is clear." *Behn* v. *Municipal Court*, 47 P.R.R.—.

From the California jurisprudence defendant's favorite case is that of Havemeyer. "It is the best studied and analyzed." It is stated on page 25 of its brief "which we find on this subject". And to give weight to its statements it cites from the distinguished author Pomeroy. Pomeroy's Equity Jurisprudence, 4th Ed., pages 3645, 3848, the following:

"The opinion of Beatty, C. J., in *Havemeyer* v. *Superior*

Court, 84 Cal. 327, 342-389, 18 Am. St. Rep. 192, 10 L.R.A. 627, 24 P. 121, is by far the longest and most elaborate to be found in any report of the subject of the appointment of receivers of corporations."

Notwithstanding our search with reference to the statements made by this author, we do not see in any place that Pomeroy approves the doctrines of Judge Beatty. He calls attention to the length of the opinion and to how elaborate it is. He does not say that the arguments are logical nor that the reasoning is solid.

The number of reasons has never been the criterion of the value of a thesis. Nor the more or less elaborateness of them. Renato Descartes, in his "Essay on Method", says that when to sustain an assertion numerous reasons are given is because none of them is entirely sound. And Justice Frankfurter, in his opinion in this case talks of the dangerous powers of the sophistic fallacies. "The power", the Justice says, "of subtle argument to give an appearance of difficulty to what is relatively simple."

To begin, the opinion in the *Havemeyer* case was given on June of 1890, in other words, half a century ago. It comprises 57 printed pages, without counting the syllabus and the briefs of the parties.

In it, Judge Beatty abandons the established doctrine and practically repeals, in California, the provisions of the statute borrowed from the State of New York.

Years later—1889, 1892, 1899—the Justices of the Supreme Court of Texas repudiated the decision in the *Havemeyer* case and reinstated the primitive doctrines.

> "The courts of Texas have several times been called upon to interpret a provision of their statutes relating to the appointment of receivers of corporations similar to that of the California Code, and have reached a conclusion directly opposite to that reached in *Havemeyer* v. *Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L.R.A. 627, 24 Pac. 121.

> In Texas, therefore, under the familiar code provision, that receivers may be appointed in cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, a receiver may be appointed on the application of the state after judgment in quo warranto proceedings against the corporation; *East Line & Red. River R. Co.* v. *State*, 75 Tex. 434, 12 S.W. 690; *Texas Trunk R. Co.* v. *State*, 83 Tex. 1, 18 S.W. 199; *San Antonio Gas Co.* v. *State*, 22 Tex. Civ. App. 118, 54 S.W. 289." 4 Pomeroy's Equity Jurisprudence (4th ed.) pages 3657, 3658.

After the action of the Texas Justices the majority of the American courts have consistently ignored the theory of the *Havemeyer* case notwithstanding its presence and its notoriety in the treatises and juridical encyclopedias.

Such, is what we may call the history of complainant's favorite case.

The slight value of this decision clearly appears from a mere reading thereof. Judge Beatty repeatedly holds in different ways that a receivership is an outrage perpetrated on the stockholders and directors of the defunct entity. This statement involves several inaccuracies.

Receiverships, as provided for in the Codes, were a present offered by Equity to the corporate interests. Under the English Common Law the corporate death was not an empty phrase, but an absolute reality.

> "Its real estate reverted to the grantor and his heirs: Angell & Ames on Corp. 779; Field on Corporations, secs. 491, 492. The personal estate vested, in England, in the king and in America, in the people. The debts due to and from the corporation were totally extinguished: A. & A. on Corp., sec. 799; Field on Corp., secs. 491, 492." 12 Am. Dec. 239, Annotation.

The harsh but just rules of the past were mitigated with the

passing of time. Equity found in receiverships, as we understand them today, the least imperfect equation between the interest of society and those of individuals. See *Bacon et al.* v. *Robertson et al.*, (1855) 59 U.S. 480.

But, apart from this historical reflection, the truth is that receivership was never considered, neither before nor after the *Havemeyer* case, as a punishment or penalty imposed on directors and stockholders or upon third persons.

In *East Line & Red. River R. Co.* v. *States* (1889) 12 S.W. 690, 696, the Supreme Court of Texas refutes Judge Beatty's conclusions as follows:

> "Receiver may be appointed in cases where a corporation has been dissolved, or is insolvent, or on imminent danger of insolvency, or has forfeited its corporate rights. Acts 1887, p. 120, sec. 1, subd. 3. And his powers and duties are therein fully defined. There is nothing in this legislation violative of the right of any person or corporation. The property will go into the hands of such person as may be appointed receiver, subject to all just claims to it or upon it, and these may be adjusted in accordance with the well-settled rules applicable thereto."

And, finally, in *State* v. *Municipal Saving & Loan Co., supra* (1924), 144 N.E. 736, 738, the Supreme Court of Ohio very correctly states as follows:

> "In the long run, the Legislature has found it a financial advantage to stockholders of a corporation against which involuntary dissolution is asked by the state to have the affairs of the corporation in question administered by persons not interested in the action when the parties do not consent to the appointment of persons interested."

Judge Beatty also states that those most qualified to carry out the liquidation of a defunct entity are its last directors. (Page 369.) "Because a corporation has violated its duty" the Judge says, "it

does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary; for it is usually a too exclusive regard for their own interest that constitute their dereliction to the public." This is denied by Judge Floy of Texas: "To place the property again in the hands of the officers of the corporation would be to return it to the custody of those who had failed to perform their trust, and had violated the laws of the state, and the public interests would not be subserved thereby." *San Antonio Gas Co.* v. *States, supra,* 289, 294.

And, finally, the California Justice holds that the state, not being a stockholder nor creditor and therefore lacking all interest in the property of the defunct corporation, cannot request the appointment of a receiver.

Leaving aside the contradiction which this affirmation involves (the right of the Attorney General to prosecute those who usurp franchises by means of quo warranto proceedings is recognized, but he is denied the means of avoiding the continuance and perpetration of such usurpation under other forms) we will allow the authorities to speak for us.

In *Olson* v. *Bank of Tacoma,* (1896) 45 P. 734, 735, the Supreme Court of Washington in construing certain legal provisions with regard to receiverships, said the following:

> "Section 326 provides that a receiver may be appointed by the court in the following cases . . . '5 (When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.' Such being the provisions of our statute, it seems too clear for argument that the court of proper jurisdiction has a right to appoint a receiver, at the instance of any party interested, whenever it is made to appear to it that such corporation is insolvent, or has forfeited its corporate rights. No other conditions are imposed by the statute, and to import any other would be judicial legislation."

And in *State* v. *Superior Court,* 47 P. 32, 34, the same court adds:

"After such a judgment has been rendered against the defendant as is provided for by section 688, proceedings may be instituted by the prosecuting attorney by virtue of section 689, in which it may be proper to appoint a receiver to take an account and distribute the property of the alleged corporation among its creditors, if any it may have."

We have commented the Havemeyer's opinion rather extensively not because we believe that the persuasive value of its doctrines justify such a comment, but out of deference to the distinguished attorneys for respondents who have given great stress to said case.

Even under the reactionary opinion of Judge Beatty, The People of Puerto Rico has a right to obtain the appointment of a receiver inasmuch as the pertinent statutes of Puerto Rico today are not the same as those imposed in California in 1890.

In the first place, section 184 of the Code of Civil Procedure of Puerto Rico provides that "No party, or attorney, or person *interested* in an action, can be appointed receiver therein, without the written consent of the parties, filed with the secretary". And a section similar to this has been recently construed to disqualify the directors and officers of a defunct corporation to act in the liquidation of the entity.

In *State* v. *Municipal Saving & Loan Co., supra,* (Supreme Court of Ohio, June 21, 1924), 144 N.E. 736, 738, it is held that a director of a corporation, for the purposes of the appointment of a trustee in liquidation, is an employee of the company, and, as such an interested party.

"Allen, J.:

". . . Later in the same day the court of common pleas appointed the three trustees as receiver of the Municipal Savings & Loan Company. To this order plaintiff excepted, upon the ground that—

"'Said persons are disqualified from such appointment by reason of their previous selection and appointment as trus-

tees of this corporation under section 11972 of the General Code of Ohio, and for other reasons appearing in the record of this case.'

"Section 11894, par. 5, of the Ohio General Code, in the pertinent part, thereof, provides that receivers may be appointed by the court in cases provided for by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.'

"Section 11895 of the General Code provides that:

"'No party, attorney, or person interested in an action, shall be appointed receiver therein except by consent of the parties.'

"The instant appointment is not a case of consent of the parties.

"Nor does this case arise under section 11944, General Code, which in part reads:

"'A director, trustee, or other officer of the corporation, or any of its stockholders may be appointed a receiver . . .'

"This section is a part of the chapter entitled 'Dissolution of Corporations', and refers only to cases of voluntary dissolution of a corporation. The instant case, however, is not one of voluntary dissolution. Hence this is not an action in which under the statutes it is permissible to appoint a director, trustee, or other officer of the corporation, or a stockholder as receiver." . . .

"A receiver is a person indifferent between the parties appointed by the Court. He is appointed on behalf of all the parties and not on behalf of the complainant or defendant only, to receive and hold possession and control of any or all property which is the subject matter of litigation pending the suit, and subject to the orders of the court. *Baker v. Backus*, Adm'r., 32 Ill. 79.

"The purpose of the action herein brought was to transfer

possession of the property from the corporation to the receiver. The representative of the corporation were the trustees; they had possession of the property, and the action was for the purpose of taking possession of that property out of their hands, and to that extent was adversary as against the trustees."

"We shall now consider whether the trustees were interested in the action. It is conceded that 'interested in the action' means financially interested. The trustees in this case were appointees of the corporation; they were its employees to the extent that their compensation as trustee was subject to the action of the corporation."

"The trustees being appointed by the directors of the corporation, being responsible to the stockholders of the corporation, being entitled to compensation from the corporation, are agents and employees of the corporation. They are in fact persons interested in the action."

"The question here is not in what cases a receiver may be appointed; the question is: Who may or may not be appointed receiver? And that question is answered in the negative as to the three trustees by section 11895."

"It is conceded that the court has a certain discretion in the appointment of receiver, which discretion may not be interferred with except in circumstances of palpable abuse. This discretion, however, does not permit the court to violate the statute. In spite of their qualifications the three trustees were appointed receiver under unusual circumstances. They filed an answer challenging the power of the court to remove them, by appointment of a receiver, and hence by implication challenging the power of the court to place the corporate assets in custodia legis. They withdrew their answer and cross-petition and within a few hours were appointed receivers."

"Granting as we do everything that has been stated as to

> the fitness of the men named, the very thing here done was forbidden by statute. It was forbidden by statute because it is of the utmost importance in receivership matters to avoid not merely evil but also the appearance of evil."

Judge Beatty does not mention in his opinion whether California at that time had a similar statutory provision.

Apart from this distinction we have still a more clear distinction. The *desideratum* in the *Havemeyer* case is the lack of interest of the State in the properties of the entity; the public interests and the obligations incurred with society were not considered by said Judge. However this lack of interest does not exist in our case.

In order to secure the right of The People of Puerto Rico to exercise its option of confiscating the properties of the dissolved corporation or of asking for the sale of said properties in public auction our statutes provide the following:

> "When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months, counting from the date on which final sentence is rendered." (Section 1, Law No. 47, approved August 7, 1935; Laws of that year, Special Session, pages 530–532.)

This interest of The People of Puerto Rico in the real property of the corporation must be considered, by implication, as alleged in the petition, inasmuch as this is a right arising from the statute of which this court takes judicial notice.

And finally, to end this part of our reply, we need hardly add that the comments and distinctions herein made apply not only to the *Havemeyer* case but also to its offsprings or ramifications.

(c)

The insufficiency of The People of Puerto Rico's motion praying for the appointment of a receiver.

This last point need hardly be discussed. The petition of The People of Puerto Rico has not been made unseasonably as respondents contend, nor are the facts alleged therein insufficient as respondents also allege.

The motion has been seasonably filed. To allege the contrary would be equivalent to contradicting directly the very statute which authorizes the appointment of a receiver. "In the case when a corporation . . . has forfeited its corporate rights." In other words, it is after and not before the confiscation of the corporate franchise that the petition should be filed. The contingency—"has forfeited its corporate rights"—is the true point of departure to request and obtain the appointment of a receiver in this case. It can hardly be argued that the jurisdiction of this court ends at that point where it begins. The express terms of the statute as well as the decisions of the courts offer a ready answer to this question:

> "Section 4029 of the Code of 1906 provides for the appointment of such a trustee, but *only after judgment of forfeiture and ouster.*" (*Jackson Loan & Trust Co.* v. *State,* (Supreme Court of Miss., 1911), 56 So. 293, 295.)

After the corporate franchise has been forfeited the appointment of a receiver lies at any time when the need therefor arises. Thus, in *State* v. *Peabody Petroleum Co.* (Supreme Court of Kansas, Jan. 7, 1928) 262 P. 1027, 1029, after almost four years had elapsed since the confiscation of the franchise the state petitioned for and obtained the appointment of a receiver. The Chief Justice of said court said as follows:

> "It is argued that the word 'upon' as used in the statute carries the inference that action must be taken when the dissolution occurs by reason of a forfeiture of the charter unless a receiver is appointed, and if this is not done at the time of

the forfeiture neither the state nor the stockholders and creditors of the corporation may take any action to compel the proper administration of the trust and to wind up the affairs of the company.

"We think this was not the legislative purpose in the enactment of the statute. The right to take action for the appointment of a receiver accrues when a corporation is dissolved, but it is not lost by the failure of the Attorney General to act immediately upon the declaration of forfeiture or a dissolution."

The argument therefore that the jurisdiction of this court ends upon the rendering of an unappealable judgment, because the proceeding has terminated, in the light of the provision of section 182 of the Code of Civil Procedure is an absolute absurdity.

Nor are respondents correct in contending that the motion of The People of Puerto Rico does not state sufficient facts. The cases involving forfeiture of franchises are necessarily based on the illegal conduct of the directors of the corporation and for this reason they are exceptional cases to which the authorities with regard to voluntary dissolutions cannot be applied.

The corporation due to its fictional personality acts through natural persons; its directors; and, when the forfeiture of the franchise is decreed because of illegal conduct on the part of the corporation it is decided at the same time that the directors are not qualified to act as trustees or receivers in the liquidation of the entity. It would be absurd to contend that The People of Puerto Rico must allege and prove again what it has already alleged and proved in this quo warranto proceedings. As the facts showing the necessity for the appointment of a receiver appears from the record of this case, the petition asking for the appointment is a mere formality. That this is so is demonstrated by the fact that when the statute so authorizes it the receiver may be requested in the quo warranto petition and his appointment may be decreed in the judgment ordering the forfeiture of the charter.

"The judgment against a corporation, in the case of a forfeiture of its charter, is that the franchises be seized into the hands of the state. *It may also provide for the appointment of a receiver or trustee to take possession of the property of the corporation, where the court is authorized to make the appointment, and where it is asked for in the information.*" (14 C.J. 1140, sec. 3777.)

Respondents allege finally that the proceeding against them has terminated; that there is nothing to liquidate inasmuch as the corporation has paid all its debts and that those who were its members have constituted themselves in a new entity under the form of a civil partnership; and that for this reason the petition of The People has no practical purpose. Respondent forgets however that the principal objective of this proceeding is not the punishment for a violation of its franchise but to protect the economy of the island by a distribution of the large land holdings in its possession. While these vast land holdings continue, under whatever name or possible form, it cannot be seriously contended that the question has been terminated.

The Congress of the United States in 1900 anticipated the remedy against the evils of large land holdings so as to avoid the impoverishment of our economy; and while this remedy is not applied in such manner which assures the eradication of this evil the question will continue pending.

"Surely nothing more immediately touches the local concern of Puerto Rico than legislation giving effect to the Congressional restriction on corporate land holdings. This policy was born of the special needs of a congested population largely dependent upon the land for its livelihood. It was enunciated as soon as Congress became responsible for the welfare of the Island's people, was retained against vigorous attempts to modify it, and was reaffirmed when Congress enlarged Puerto Rico's powers of self-government. Surely Congress meant its action to have significance beyond mere

empty words." (*People of Puerto Rico* v. *Rubert Hermanos*, Adv. Ops. Oct. Term, 1939, p. 618.)

Our legislature, also, alarmed by the increase of the evils which large land holdings create in Puerto Rico approved local statutes known as "the five hundred acre statute", all of them inspired in the purpose of dividing the large corporate land holdings. It would be inconceivable therefore that the intent of the Congress of the United States and of their own Legislature could be frustrated by a comedy of dissolution.

San Juan, Puerto Rico, July 16, 1940.

Respectfully,

GEORGE A. MALCOLM,
Attorney General.

MIGUEL GUERRA-MONDRAGON,
RAFAEL RIVERA-ZAYAS,
LUIS VENEGAS-CORTES,
Associate Attorneys.

Notified with copy this sixteenth day of July, 1940.

JAIME SIFRE, JR.,
Attorney for the Respondent.

[Title omitted.]

REPLY BRIEF IN OPPOSITION TO THE MOTION FOR APPOINTMENT OF A RECEIVER.

[Filed July 15, 1940.]

Antecedents.

Petitioner has filed a brief setting out the reasons which in its judgment justify the appointment of a receiver. We proceed to answer it to demonstrate that petitioner's contention is untenable and that the motion should be denied.

Argument.

I.

The objective of the motion as per the motion and the objective of the motion according to the original brief of the Government.

We have maintained in our first brief that the motion filed by the petitioner does not invoke in adequate manner the jurisdiction which in the opinion of the petitioner this court possesses, for which reason, even within the hypothesis that jurisdiction exists, there is no ground for the exercise of judicial discretion. In said brief we called the attention of the court to the fact that The People of Puerto Rico in its motion limited itself to expressing its opinion that the dissolution and disposition of the properties *should be effected by a receiver* and that the motion so drafted requesting the appointment of a receiver does not adapt itself to the precedents established by this same court, and generally by the jurisprudence dealing with the requisites of an application, petition or motion for the appointment of a receiver. *Hardy* v. *North Butte Mining Co.*, 20 F. (2d) 967; 22 Cal. Jur., sec. 351, page 458; High on Receivers, sec. 84, page 111; *Schluter* v. *Texidor*, 26 P.R.R. 97; *Balasquide* v. *Ros*, 18 P.R.R. 33; 53 C. J., sec. 43, page 53.

The jurisprudence as to this particular is so clear that there can be no doubt as to the correctness of our position, but should there be any doubt it would have to disappear in view of the statements made by The People of Puerto Rico in its original brief filed in support of the motion. In accordance with what is set out in the the brief, The People of Puerto Rico requests the appointment of a receiver to maintain the status quo as to the properties pending the exercise of the option by The People of Puerto Rico to purchase them or to sell them at public sale. However, in the motion the appointment of a receiver is requested because in the judgment of the petitioner the process of dissolution and *disposition* of the properties of the respondent should be entrusted to a receiver.

These two theories are irreconcilable because the objective under the theory of disposing of the properties through a receiver, that is to say, of liquidating, is contrary to the objective of maintaining the status quo until the Government decides if it purchases them or forces their sale at public auction. And we are not dealing only with the insufficiency of the motion *but we are also dealing with a motion which fails to express the true objective of petitioner in requesting the appointment of a receiver and which not even insinuated that true objective or theory,* to wit, that of protecting rights which the Government pretends to have in accordance with its opinion and in accordance with its interpretation with which, of course, we do not agree under Law No. 47 of August 7, 1935.

If it is true that The People of Puerto Rico rests its petition for the appointment of a receiver upon the provisions of that law and under the theory that it sets out in its brief, it is indisputable that it should have set out in the motion the reasons and facts which in its judgment give it the right to obtain the appointment of a receiver under this legislation, in the first place in order that the court may consider and decide, with full knowledge of the issues, whether it has jurisdiction to act, and if so, in what form it should make use of its discretion; in the second place in order to give an opportunity to respondent to defend itself under that theory; in the third place, in order that with the motion and answer both the court and the parties may understand the issues under discussion, and lastly, so that the pleadings and not the briefs should set forth and define the issues.

There is not a single allegation in the motion suggesting or insinuating that a receiver is requested to protect The People of Puerto Rico in case that it should wish to purchase the properties. There is nothing in the motion that suggests or insinuates that The People of Puerto Rico desires a receiver as a means of imposing certain of the penalties of which Law No. 47, of August 7, 1935, speaks; there is nothing said in the motion that suggests or insinuates that to determine and decide whether the appoint-

ment should be made or not it is necessary to consider certain provisions of that law which have been attacked and in regard to which there has been no decision. Among such provisions are found those that pretend to give to the Government the right to purchase or that of forcing the sale at public auction.

It is a doctrine firmly established that "where an application for the appointment of a receiver is based *on any particular ground*, the facts should be specifically set forth". 19 C. J., sec. 1750 (f), page 1531.

The "particular ground" on which the motion is based, according to the motion, is that the dissolution of the company and the disposition of the properties should be entrusted to a receiver. There is no allegation in the motion of the facts upon which petitioner bases its request for the appointment of a receiver *for that purpose and upon that ground.* The "particular ground" upon which the motion is based according to the brief of petitioner is that the appointment of a receiver should be made upon the theory (1) that the provisions of Law No. 47 of 1935 regarding the purchase of the properties by the Government or the sale at public auction are valid; (2) that perhaps The People of Puerto Rico will elect one or the other or neither of them; (3) that while the Government is making this decision it is necessary and proper that a receiver be appointed to maintain the status quo, but in the motion there is absolutely nothing alleged upon such basis, theory or ground.

And the opposing party may not contend that the total insufficiency of the motion is cured by the complainant or that the information or complaint complements the motion, because this doctrine is applicable when the petition for the appointment of a receiver specifically incorporates the allegations of the information or complaint and when both taken together present facts justifying the appointment, which is not the case here. And it is not true here for the following reasons:

The amended information or complaint did not present any other problem but that of adjudicating the right and title of Rubert

Hermanos, Inc., to continue doing business as a corporation in the Island of Puerto Rico. In the opinion rendered by this court on June 30, 1938, sustaining the amended complaint, this court said:

> "The purpose of this proceeding is to determine the right and title of the respondent Rubert Hermanos, Inc., to continue doing business as a corporation in the Island of Puerto Rico."

All that the petitioner prayed as a remedy was:

> "Wherefore, The People of Puerto Rico, by its said Attorney General, prays that this Hon. Court give judgment of ouster of its franchise against said corporation, ordering its immediate dissolution, prohibiting it to continue doing business in Puerto Rico and imposing upon it the corresponding fine, with such other pronouncements as in equity and justice may be pertinent."

The judgment that was entered decreed the forfeiture and cancellation of the corporate charter and of the articles of incorporation, further ordering the immediate dissolution of Rubert Hermanos, Inc. and the liquidation of its business. The judgment also imposed the payment of a fine, costs and attorney's fees. That is to say, in the petition the appointment of a receiver was not prayed for, nor any allegations made relative to such a remedy as the petitioner limits itself to question the right of respondent to continue doing business and to continue being a corporation, and limited itself to ask for judgment of the loss of the franchise, dissolution, prohibition to do business, etc., and the judgment entered was in accordance with the theory and prayer of the amended information or complaint. There is nothing in the information that shows the propriety or necessity or convenience of the appointment of a receiver. The only thing that is set out in the information is that the respondent violated its charter and the fundamental effect of the judgment is to cancel the charter or

franchise and decree the dissolution of the corporation. If under Article 182 of the Code of Civil Procedure the appointment of a receiver were mandatory or imperative upon the dissolution of a corporation being decreed or whenever a corporation should lose its rights as such and The People of Puerto Rico could request such an appointment, which is not the case,—*Havemeyer* v. *Superior Court*, 84 Cal. 327—it would be sufficient to show that there was a judgment of dissolution or forfeiture. But such is not the case, because the doctrine in Puerto Rico is that the appointment of a receiver under article 182 is discretional and not mandatory, and this is the doctrine in California under article 564 of the Code of Civil Procedure of that State.

> "Except where the moving party has some absolute right to the property sought to be controlled, appointment of a receiver rests largely in the discretion of the trial court. This discretion is not arbitrary or absolute, but a sound judicial discretion, which takes into account the circumstances of the case and is exercised for the purpose of protecting the rights of all parties to the action and to the property in controversy." 22 Cal. Jur., sec. 312, pages 435, 436; *California Delta Farms* v. *Chinese American Farms*, 204 Cal. 524; 269 Pac. 443; *Whitley* v. *Broadley*, 13 C.A. 740; 110 Pac. 596; *Davies* v. *Ramsdell*, 40 C.A. 432; 183 Pac. 702; *Fox* v. *Hood*, 44 C.A. 786; 187 Pac. 68; *Schluter* v. *Texidor*, 26 P.R.R. 97; *Balasquide* v. *Rossy*, 18 P.R.R. 33.

The information, the judgment and the motion, taken together, show nothing further than the dissolution of Rubert Hermanos, Inc. and the loss or forfeiture of its rights as a corporation, and because of what is said in the motion, the opinion or conclusion of petitioner that the dissolution and disposition of the properties should be entrusted to a receiver. As for the appointment of a receiver it is necessary that facts be alleged showing the necessity and propriety of the appointment and the reasons, circumstances and facts which should be carefully weighed and analyzed by the

court in order to exercise its judicial discretion in one sense or the other, it is evident that the information in this case does not cure the total and absolute insufficiency of the motion.

"It is intended by the appellant that neither the complaint nor the affidavit filed by the respondent at the time it applied for the appointment of a receiver states facts sufficient to justify the action of the court in appointing a receiver. There is no allegation, as we have seen, in the complaint itself, of any fact or facts authorizing the appointment of a receiver; and, if the affidavit filed by the respondent in support of its application does not set forth sufficient facts for such appointment, it would seem to follow that the objections of the appellant to the application should have been sustained." *Union Boom Co.* v. *Samish River Boom Co.*, 74 Pac. 54.

Clark in his work on "Receivers" states:

"Rules Governing the Appointment of Receivers.

"The following general rules may be laid down governing the appointment by a court of a receiver:

"First: That the power of appointment is a delicate one, and to be exercised with great circumspection.

"Second: That it must appear that the party moving for a receiver has a title to the property or a lien on the property or such an equitable or legal interest in the property as the rules and usages of equity or the statutes enable a court to protect by the extraordinary remedy of the appointment of a receiver.

"Third: A court of equity will not appoint a receiver on demand of one alleging to hold the legal title as against the party in actual possession of the real estate with few exceptions, because such a claimant to the legal title has a full and adequate remedy at law.

"Fourth: The appointing court must be satisfied by affidavit

or other suitable evidence that a receiver is necessary to preserve the property or in exceptional cases administer the property.

"Fifth: That there is no case in which the court appoints a receiver merely because the measure can do no harm and consent of the parties cannot confer jurisdiction on the court to appoint where without consent it has not the power.

"Sixth: That fraud or immediate danger if the intermediate or final possession should not be taken by the court must be clearly proved.

"Seventh: That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." (1 Clark, The Law of Receivers, sec. 651, pages 715, 716.)

The author adds at page 717, "The court must be satisfied by affidavit, or other evidence that a receiver is necessary to preserve the property." And we have seen that in the motion a receiver is requested because this is a means which according to the Government ought to be employed to dispose of the properties. We repeat what we have said in our first brief: that Rubert Hermanos, Inc. is not the owner of any property as its properties were transferred to a partnership that was organized by those who were the stockholders of the dissolved corporation and that it is the partnership that is the owner of the properties. But within the hypothesis that Rubert Hermanos, Inc. were still owner of the properties, we inquire: Is there any allegation in the information or in the motion as to the necessity of a receiver to dispose of the properties? Has the Government presented any evidence that would satisfy this court or which may be considered by this court as regards the necessity of such an appointment? There is a complete absence of allegations and proof. According to petitioner's brief the receiver is sought not to dispose of the properties but in order to maintain the status quo while the Government makes up

its mind as to what it should do. We again inquire: Is there any allegation in the information or in the motion relative to the necessity of a receiver to maintain the so-called status quo? Has the Government presented any evidence to satisfy this court or which may be considered by this court as to the necessity of the appointment under such theory? Neither allegations nor proof.

Assuming that Rubert Hermanos, Inc., were still owner of the properties and the motion were considered under the viewpoint of what it says, namely, from the viewpoint of the necessity of the appointment of a receiver to dispose of the properties, that is to say, liquidate; under this theory it is obvious that the court would have to consider if the trustees in dissolution were incapacitated to liquidate, inasmuch as according to our law the liquidation of a corporation corresponds to the directors of the corporation, unless upon judicial decree of liquidation a receiver is appointed at the instance of some creditor or stockholder. But such an appointment in such a case is made not only in accordance with our legislation, but also in accordance with the general doctrine, in extraordinary cases, when it is absolutely necessary, because courts are not inclined to impose the charges which a judicial administration carries with it if this is not plainly justified.

Within the theory advanced in petitioner's brief, the court would have to decide several questions, among them the one relative to the necessity of maintaining the so-called status quo by means of the appointment of a receiver and in order to do so it would have to consider, for example: if assuming that The People of Puerto Rico may elect to purchase the properties or to force their sale at public auction, it would not be duly protected by the lis pendens which according to petitioner is still in force. But as the pleadings do not raise any of these questions, the court can not proceed to decide them. The Government, due to the form of its motion, has not permitted that the issues be punctualized and defined.

II.

The theory set out by petitioner in its original brief that this proceeding is still pending because The People has not yet elected for either the confiscation or sale and that for that reason this court has jurisdiction to appoint a receiver, is not sustainable.

At last the representatives of the Government have divulged their true pretensions and purposes. In spite of their repeated protests that they had no intention to require the imposition of the penalties of confiscation or sale provided by Law No. 47 of 1935, they now request that this court appoint a receiver for the purpose of making such penalties effective. Not only do they arrogate the power of the legislature to exercise options established by law, but they also arrogate the power to establish and declare public policy.

Under the heading "Principal Objective of the Motion Discussed" the attorneys for petitioner say in their original brief that:

> "The principal objective of the motion for receiver that is discussed is the preservation of the status quo as to the lands that respondent possesses in excess of 500 acres, until the proceeding is terminated."
>
> "This question is governed by Law No. 47 (special session) approved the 7th of August, 1935. This law amendatory of the quo warranto statute of 1902, in the second paragraph of section 2, provides that 'The People of Puerto Rico may, at its option, *within the same proceeding*, institute the confiscation of the said properties in its favor or the sale at public auction within a term not more than 6 months counted from the date on which the final judgment is entered. In every case the sale or confiscation shall be made upon the corresponding indemnity in the form established in the law of eminent domain'.
>
> "The final judgment was entered on the 13th of May, 1940, if we count from the date on which the mandate was

received in the Secretary's office in the Supreme Court. The People has until 6 months afterwards—until November 13, 1940—to elect either the expropriation or the public sale in this same proceeding of quo warranto. And it is for the purpose of leaving things in the same situation and state in which they were before that a receiver should be appointed by this Honorable Court until The People of Puerto Rico decides the procedure that it will elect in the future.

"If The People of Puerto Rico has this right of option and this option may be exercised within a period of 6 months counting from the date on which final judgment is entered, it is just that this Honorable Court should support it in this right."

The petitioner maintains that this proceeding is still pending because The People has not elected for the confiscation of the properties or the sale at public auction, and that as the suit is still pending the court has jurisdiction to appoint a receiver. The opposing party is mistaken because if at any moment the petitioner could have elected for the confiscation of the properties or for the sale, such moment passed once final judgment was entered without The People of Puerto Rico having attempted to make use of this so-called option.

It is necessary that the option for the confiscation or sale at public auction of the real estate of corporations respondent in quo warranto proceedings instituted under the quo warranto law, as amended by Law No. 47 of 1935, be exercised by appropriate allegations in the information or complaint by which the proceedings are begun.

The legal provisions relative to confiscation or sale at public auction of real estate of corporations respondent in quo warranto proceedings are found in sections 2 and 6 of the Law of Quo Warranto, as amended by Law No. 47, approved August 7, 1935. It is necessary that these two sections be read together for their proper interpretation. Section 2 provides that:

"When any corporation by itself or through any other subsidiary or affiliated entity or agent, is illegally possessing by any title real property in Puerto Rico, The People of Puerto Rico may, at its option, within the same proceeding, institute the confiscation of said properties in its favor, or the sale thereof at public auction, within a period not later than six months counted from the date on which final judgment is entered.

"In every case the confiscation or sale shall be made upon the corresponding indemnity in the form established by the law of eminent domain."

Section 6 provides:

"In all cases in which it is satisfactorily established in the judgment of the court that the corporation or corporations have realized acts or exercised rights not conferred by law or in contravention of the express provisions of the same, in the judgment entered there shall be decreed the dissolution of the defendant entity, if it be a domestic corporation, the prohibition from continuing to do business in the island, if it be foreign, the nullity of all acts and contracts realized by the corporation or defendant entity, and there shall furthermore be decreed the cancellation of the entries or inscriptions of the same in the public registries of Puerto Rico, and when *the decree of nullity affects real property and The People of Puerto Rico has elected for the confiscation or the sale of the same at public auction is ordered, the final judgment shall fix the reasonable price that ought to be paid for the same.* To this end the just value of the properties subject to sale or confiscation should be fixed in the same manner fixed in cases of eminent domain."

It is necessary, therefore, for the confiscation or sale at public auction:

(1) That The People of Puerto Rico, through the branch called upon to exercise the option, that is, the Legislature, declare

through appropriate legislation the intention of The People of Puerto Rico to exercise that given option;

(2) That in the proceeding proof should have been presented in order that the court may fix the just value of the property subject to sale or confiscation, and that in the final judgment the confiscation or sale at public auction be decreed, fixing the reasonable price in the form provided in cases of eminent domain.

The term of six months provided in section 2 of the law is the term within which it is necessary to make the sale which may have been ordered in the final decree or judgment.

In the present case The People of Puerto Rico, by its authorized representatives, has not elected either for the confiscation or for the sale at public auction; within this proceeding it has not asked either for the confiscation or for the sale and the court in its judgment has not decreed the confiscation or sale nor fixed the price.

In a proceeding of quo warranto there can be only one final judgment:

> "Except where by virtue of statute, separate judgments may be entered as to different defendants, there can be only one final judgment in any action; and, therefore, when such a judgment has once been entered, no second or different judgment can be rendered between the same parties and in the same suit, until the first shall have been vacated and set aside or reversed on appeal or error." (33 C. J., page 1193.)

And if the judgment entered in this case on the 30th of June, 1938, had not been a final judgment, said judgment would not have been appealable. U.S.C., sec. 225, Title 28.

The representatives of The People of Puerto Rico, in the argument of this case before the Supreme Court of the United States expressed the opinion that if The People of Puerto Rico wished to make use of the option to confiscate or sell at public auction after the judgment it would have to do so through a new proceeding. To this effect Colonel Rigby said:

"If it did (exercise the option), it would have, as I have said before, as we understood it, to file a supplemental bill or some new action in court, or begin a new action and proceed and give the respondents their day in court, *because there is nothing in this case to authorize a summary proceeding, upon the face of this record.* There is nothing of that kind in this judgment at all."

The construction that petitioner gives to articles 2 and 3 of the Law No. 47 of 1935—that are now, according to the Government's brief, the provisions on which the motion requesting the appointment of a receiver is based—leads to an absurdity. According to this construction, The People of Puerto Rico, by its representative the Attorney General, may wait six months after final judgment is entered to decide whether it is going to elect between the confiscation or sale of the properties of the corporation dissolved by said judgment. If the Government decide to exercise this so-called option, without initiating any other proceeding or action and without other allegations than those contained in the original information or complaint, the court, according to this construction, is obliged to hold a hearing to satisfy itself by competent and relevant evidence of the true value of the properties which it is pretended to confiscate or sell at public auction—the value that they may have on the date of the hearing, that is, more than six months after the judgment is entered. No one can say what length of time would be consumed in the presentation of evidence or when the court would be in a condition to fix the price. It may take a month, perhaps two months, may be longer; and then, according to the pretensions of the petitioner, the real property must be divided in parcels to be sold to "many agriculturists", which means a series of sales. In such a case the court would have to fix a price not for the properties as they exist, but the value of parcels or tracts in which they are to be divided in accordance with the opinion or caprice of the representatives of the Government. What disposition the attorneys

for petitioner could or pretend to make of the sugar factory, buildings, railroad, appliances and other effects, we do not know. In the original brief of the Government there is a mention of excess lands, but in the motion the appointment of receiver is sought not for such excess lands, but for all the properties that belonged to Rubert Hermanos, Inc., and the Law No. 47 itself does not limit confiscation or sale to excess lands but covers the confiscation or sale of all real property.

At a later point we will show that the same attorneys who now insist upon the appointment of a receiver under the theory of the provisions of said Law No. 47 of 1935, have maintained and have been of the opinion that in order to obtain the confiscation and sale at public auction under the provisions of said law, it is necessary that the same should have been requested or sought in the information or complaint of quo warranto.

The term of six months that section 2 of Law No. 47 fixes is the maximum term within which it is necessary to make the public sale ordered in the final judgment; the phrase "within a term not greater than six months" limits and is applicable to the phrase "the sale at public auction". Grammatically and in accordance with the rule of statutory construction (last antecedent rule) the words "within a period not greater than six months" apply to and qualify the words "sale at public auction" that immediately precede, and not the word "option". *Puget Sound Electric Ry.* v. *Benson*, 253 F. 710; *State, ex rel. Stewart* v. *District Ct.*, 65 Pac. (2d) 141; *Hopkins* v. *Anderson*, 21 Pac. (2d) 560; *Board of Port Commr's* v. *Williams*, 60 Pac. (2d) 454; *Taylor* v. *Prudential Ins. Co.*, 253 N.Y.S. 55.

It is clear that the court could not decree the confiscation or the sale at public auction unless the petitioner had alleged in the information that it had elected in the same proceeding to request in the final judgment or decree either the confiscation or the sale.

III.

Even though the real property that belonged to Rubert Hermanos, Inc., were still under the ownership, possession and control of said corporation or of its trustees, the court would lack jurisdiction to decree the confiscation or the sale at public auction of said properties because the provisions of said Law No. 47 establishing penalties of confiscation or sale at public auction of the properties of corporations respondent in proceedings of quo warranto are invalid. This court has implicitly recognized this.

From the very first moment respondent has attacked in this court the validity of Law No. 47 of 1935 and one of the principal grounds of such attacks has been that the penalties decreed therein convert said law in an ex post facto law. This court never decided or expressed an opinion as to this contention.

Furthermore, this respondent in this case maintained before this court that, as to such penalties, the law should not be given retroactive effect.

Said Law No. 47 of 1935 in its section 2 made it mandatory upon this court, in the judgment which it might render when "it is satisfactorily established . . . that the corporation or corporations have realized acts or exercised rights not conferred by law", to decree such penalties.

In the judgment rendered in this case this Honorable Court has not decreed any of such penalties. It is not admissible to assume that this Honorable Court has refused to comply with a valid mandate of the legislature. The only inference permissible from the omission of such penalties in the final judgment is that the court considered either that said penalties were invalid or that as to such penalties said law did not have a retroactive effect.

It is impossible to conceive that in a country where the American Constitution and the system of laws that we have are in force the Attorney General or any officer or branch of the Government has the power to impose a penalty in one case and under identical circumstances relieve from such penalty in another case. We

refer to the provisions of section 2 of Law No. 47 of 1935 amendatory of the law of quo warranto which referring to the so-called option state that "The People of Puerto Rico may, at its option, institute the confiscation of the property in its favor, or the sale at public auction." In other words, that in a given case the government might request the confiscation; in another the sale at public auction, or neither of the two penalties. If this could be done then it is unquestionable that the guaranty as to the equal protection of the law, would lack all meaning and effect.

If this court had had any idea that in this proceeding the imposition of the penalties established by said law were possible after judgment, it would have deemed its duty to determine as to the validity of the statutory provisions establishing such penalties in order that its decision on this point could have been examined and passed upon by the appellate tribunal. We believe that this court was of opinion, whatever may have been the basis of said opinion, that in this case there was not involved any question relative to the imposition of said penalties, a belief that is fully justified by the language of the opinion and judgment entered in this proceeding.

IV.

The Attorney General is not authorized to exercise the option that the law pretends to confer upon The People of Puerto Rico.

There is no law that empowers the Attorney General to exercise the option that Law No. 47 of 1935 pretends to grant to The People of Puerto Rico. Section 1 of said law reads in part: "The People of Puerto Rico may, at its option, institute etc." and section 2 provides that: ". . . and The People of Puerto Rico should have elected". So that the duty and power of election is in The People of Puerto Rico and not in the Attorney General.

The representatives of petitioner say in their original brief that "The People of Puerto Rico has until six months after—November 13, 1940—to elect either for the forcible expropriation or for the sale at public auction in the same proceeding of quo

warranto." We understand that this recognizes that the Attorney General may not exercise the option.

If it is also admitted that the only branch of the Government that can exercise said option is the legislative branch, the consequence is that it would be necessary to have a session of the legislature in order that this body should decide. We know that unless the Governor convokes an extraordinary session of the legislative assembly there will be no session of the legislature until the second Monday in February, 1941. According to the theory of petitioner during all this time the receiver would be in possession with all the expenses and consequences that his appointment would entail, without any guaranty that at the end use of the option would be made to purchase or to sell at public auction, or for either of them, because all would depend on what the legislative branch decides.

There is no probability that the legislature will be convoked within six months. Neither can anyone say that in case it were convoked for an extraordinary session during said term, the Governor would include this matter in the call. After the judgment of June 30, 1938, was entered there have been two regular sessions of the legislature, and it seems at least probable that if there had been the slightest intention on the part of the legislature to act, it would have done so in one of said two sessions, either at the instance of the legislature itself or upon request of the executive officers of the Government of Puerto Rico.

V.

Neither the Attorney General nor his officers of the so-called bureau of the five hundred acres may establish or declare the public policy of The People of Puerto Rico.

In their brief the representatives of petitioner say that the fundamental spirit of the land law is "The distribution among many agriculturists of the lands possessed by corporations in excess of the limit fixed by law" and that said lands should not "revert to the same or a few hands".

They do not specify in what land law such provisions are found. But this is not the first time that the representatives of petitioner have stated, in one form or another, that the public policy of Puerto Rico is to prohibit the accumulation of great areas of land in the hands of one or few entities or persons. And we have also noted that in statements published in the "World Journal" of March 26, 1940, by Guerra-Mondragon, Esq., he declared that it was the intention of the Government, in the quo warranto cases, to ask for the appointment of receivers to sell the lands of defendant corporations in small parcels, but little by little so as not to affect the prices.

Of course, the public policy that the representatives of petitioner attempt to define is imaginary, it has never been declared by the only authorized source, namely, the Legislature.

> "Public Policy.—It is generally recognized that the public policy of a state is to be found in its constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions. In order to ascertain the public policy of a state in respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. All questions of policy are for the determination of the legislature, and not for the courts, and there is no public policy which prohibits the legislature from doing anything which the constitution does not prohibit. Hence the courts are not at liberty to declare a law void as in violation of public policy. In accordance with these general principles, it has been said that if a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state. Where courts intrude into their decrees their opinion on questions of public policy they in effect constitute the judicial tribunals as law-making bodies in

usurpation of the powers of the legislature." (6 R.C.L., pages 109, 110; *Chicago B. & I. R. Co.* v. *McGuire*, 219 U.S. 549; *Mutual Loan Co.* v. *Martell*, 55 U.S. 328; *Hunter* v. *Pittsburgh*, 207 U.S. 161; *Green* v. *Frazier*, 253 U.S. 233; *State Tax Comr's.* v. *Jackson*, 283 U.S. 527.)

"It is generally recognized that the public policy of a state is to be found in its Constitution and statutes. Only in the absence of any declaration in these instruments may it be determined from judicial decisions. The Supreme Court has pointed out the limitations both of judicial declaration of public policy and of the application of the theory, stating that the theory of public policy embodies a doctrine of vague and variable quality and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.

"In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. With the foregoing considerations as its basis, the rule has become settled that all questions of policy are for the determination of the legislature, and not for the courts. In accordance with these general principles, it has been said that if a state constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state.

"Where courts include in their decrees their opinions on questions of public policy, they in effect make the judicial tribunals law making bodies in usurption of the powers of the legislature. Although public policy and comity may be decisive in the determination of what law shall be applied in given circumstances, the judges may not recognize or deny, at their pleasure or caprice, the rights which individuals may

claim under it, but the rule thus adopted, having obtained the force of law by user and acquiescence, belongs only to the political department of the state, as far as changes are concerned, whenever such changes become desirable." (11 American Jurisprudence, pages 813, 817.)

Until now the only public policy of Puerto Rico established by law as regards the ownership and control of lands is found in the Joint Resolution of Congress which has been incorporated in the Organic Law in force and in the Law of Corporations of Puerto Rico. It is declared by implication in said laws that it is against the public policy that corporations authorized to engage in agriculture should possess and control more than 500 acres of land in Puerto Rico. There is no such prohibition or declaration of public policy as the representatives of petitioner pretend, that is to say, that said prohibition is extensive to persons, communities and entities not corporations, and until such prohibition and limitation has been decreed by or incorporated in a valid law the public policy which the attorneys for petitioner invoke does not exist.

VI.

Petitioner is estopped by the statements and representations of its attorneys before the courts, to request the confiscation or sale at public auction of the properties that belonged to respondent.

By demurrers filed in this court, respondent Rubert Hermanos, Inc., contended that the provisions of Law No. 47 of 1935, establishing penalties were invalid as repugnant to the provisions of the Organic Act of Puerto Rico and particularly to those that prohibit the passage of ex post facto laws. Rubert Hermanos, Inc., further contended that the said provisions were not separable from the other provisions and that therefore they invalidated the entire act.

This Honorable Court did not deem it necessary to decide regarding the validity of the provisions that establish the penalties. Precisely for the reason that the attorneys for respondent feared

that attorneys for petitioner would attempt to obtain the imposition of said penalties and to avoid that at any moment it might be alleged or sustained that respondent had waived its contention regarding the invalidity of the same, respondent filed an appeal to the Circuit Court of Appeals for the First Circuit from said judgment rendered by this court.

In the brief filed in said court by respondent-appellant its attorneys again presented their arguments attacking the validity of said provisions of a penal character.

In the brief of The People of Puerto Rico—appellee in the appeal of this case before the Circuit Court of Appeals, signed by the then Attorney General of Puerto Rico, Mr. Benigno Fernandez-Garcia and by Messrs. Miguel Guerra-Mondragon, Rafael Rivera-Zayas and others, the representatives of the appellee made the following statements (pages 54–55 of said brief):

> "Third: No questions under those additional penalties has ever been raised in this case. As hereinbefore pointed out (Ante, Point X), no such penalties were adjudged by the court in this case. They were not asked for by The People, either in the original complaint or in the 'Amended Complaint' or at any other time during the progress of the case; and were not imposed in the court's judgment. The penalties there imposed are simply those which were authorized by the quo warranto statute prior to its amendment in 1935. There is, therefore, *in this case, no room for any question* as to whether or not, had there been an attempt made to impose those penalties on this corporation defendant, then such application, under all the circumstances of this case, would (or would not) have been the imposition of ex post facto penalties. *That question is not* here. If the imposition of such penalties against it should ever be mooted in any future proceeding, this corporation would then have ample opportunity to raise this question and to defend itself in that proceeding."

When this case was argued before the Circuit Court of Appeals and answering statements made by the attorneys for Rubert Hermanos, Inc. to the effect that the principal purpose of having appealed had been the fear that the representatives of The People of Puerto Rico would attempt to apply the penalties provided by Law No. 47 of 1935, Attorney Guerra-Mondragon stated to the court that he was greatly surprised by the statement of the representative of appellant because the attorneys for The People of Puerto Rico not only had not asked that the penalties of confiscation, sale and others established by the said law be imposed, but had stated frankly in The Supreme Court of Puerto Rico that they had no intention of asking that such penalties be imposed. To these statements the attorney for respondent-appellant, Mr. Brown, answered that if the representative of The People of Puerto Rico would give any security that they would not attempt to obtain the imposition of such penalties then Rubert Hermanos, Inc., would immediately dismiss the appeal.

And in the brief presented by Rubert Hermanos, Inc. in the Supreme Court of the United States in opposition to the petition for certiorari filed in said court by the attorneys for The People of Puerto Rico, attorneys for appellant, then respondent, repeated (page 13):

> "Respondent declared its willingness to abandon its appeal, dissolve and pay the fine and costs imposed by the Supreme Court upon an assurance by petitioner that no attempt to enforce the forfeiture and penalties legislated in Act No. 47 would be made. No such assurance was ever given."

Answering the brief of Rubert Hermanos, Inc., petitioner The People of Puerto Rico, in its opposing brief, which has the names of Messrs. William C. Rigby, and George A. Malcolm, Attorney General of Puerto Rico, as attorneys for The People of Puerto Rico in the proceeding of certiorari, at page 3, stated:

> "No reply to this seems necessary. It seems hardly neces-

sary to point out that, if the insular government had 'chosen' to confiscate this respondent corporation's lands under that provision of the statute, *it would have been necessary for the government to set up, by proper allegations (either in this proceeding or in some other proceeding)*, that it had so 'chosen' and to ask for a decree of confiscation on that basis, and thus submit the matter to the court for decision; and that, of course, in any such proceeding the respondent corporation would have been entitled to its day in court, and to its opportunity to combat the government's claim of right to have so 'chosen' to confiscate the land.

"And, in such a case, the corporation would have the opportunity, among other things, if it so desired, to set up (and to be heard upon) its contention that, with regard to its lands purchased prior to 1935, the application of those provisions of that statute would be in the nature of an ex post facto proceeding.

"But None of Those Questions is Here. The government has not so 'chosen' to confiscate this corporation's lands. No such allegation is in the complaint here. Accordingly, the Circuit Court of Appeals, like the Insular Supreme Court, ignored this contention of the respondent."

In the brief filed also in the Supreme Court of the United States by The People of Puerto Rico in said certiorari proceeding, which brief has the names of Messrs. William C. Rigby, Miguel Guerra-Mondragon, George A. Malcom and Rafael Rivera Zayas, as attorneys for petitioner, they made to the court, at pages 60 and 61 of said brief, the same statements that we have previously copied.

In the argument before the Supreme Court of the United States Colonel Rigby, one of the attorneys for The People of Puerto Rico, stated:

"Those penalties, however, as we see it here, are not involved in this case because there is no prayer here for the

imposition of any penalty except the dissolution of the corporation itself, the fine and the costs which have been provided for by the original quo warranto statute."

Then the following dialogue took place between the Chief Justice of the court and Colonel Rigby:

"The Chief Justice: Was there any provision with respect to the disposition of property that had been acquired by the corporation?

"Mr. Rigby: There is a provision that if the Island Government has so chosen, there shall be a forfeiture of the property and a cancellation of all the entries in the records.

"The Chief Justice: You mean forfeiture to the Government?

"Mr. Rigby: To the Government; that has not been asked in this case. Our opponents call attention to that and say the existence of that provision for the penalty makes this an ex post facto law, because these penalties were imposed after the organization of this corporation.

"Our answer to that is twofold; in the first place, as I have said, that that has not been asked in this case nor adjudged by the Supreme Court of Puerto Rico; that if later on an attempt should be made to enforce the penalties, proper allegations would have to be made and the company would have its day in court upon them."

And answering a question of Justice Frankfurter, Colonel Rigby said:

"Under this Act 47 of 1935, if the insular government had so chosen, these additional penalties may be imposed by the court, but there is no allegation here that the insular government has so chosen. There is no decree of that kind.

"Now, as I said before, that last clause is not, as we see it, of any consequence in this proceeding, because the People of

Puerto Rico have not chosen to confiscate it, and there is no prayer to that effect in the complaint, and there is nothing of that kind in the judgment of the court."

Then Mr. Justice Stone asked:

"How is their choice evidenced, by a suit?

"Mr. Rigby: I presume it would have to be by a suit, by a suit, by some formal action of some kind. Nothing of that kind is here so far as the facts in this case are concerned. The prayer is only, as I read, in the usual form, under quo warranto procedure for forfeiture of charter, license to do business, dissolution of the corporation, fine and costs—and that is all that has been ordered. So, normally what would follow that in effect would be a requirement of dissolution by the stockholders in the manner pointed out by the corporation law, and, if necessary, the appointment of a receiver and the winding up of the business of the corporation, as the business of any corporation is wound up upon death of the corporation, for any purpose at all or for any reason."

Upon the representative of respondent Rubert Hermanos, Inc., commenting on the fact that they had not been able to obtain any statement from the Supreme Court with regard to the provisions of Law No. 47 of 1935, relative to penalties, the following dialogue took place:

"Mr. Justice Stone: There has been a decree against you on that point?

"Mr. Brown: No, your Honor.

"Mr. Justice Stone: It will be time enough to raise that question when there is. It is not necessary that we make any commentaries. 'The rule that one who comes into equity must come with clean hands applies to an applicant for receiver.'" Pomeroy's Equity Jur. (4th ed.) sec. 1488.

VII.

Counsel for petitioner is mistaken in maintaining that Rubert Hermanos, Inc. is not dissolved because the certificate of dissolution has not been published.

If the publication of the certificate of dissolution issued by the Executive Secretary of Puerto Rico were necessary in this case, it is obvious that the appointment of a receiver to make such publication would not be necessary and that, according to the petitioner, is the only thing lacking to effect the dissolution of Rubert Hermanos, Inc. The fact is, nevertheless, that the corporation was dissolved by and as a consequence of the judgment of this court that decreed the forfeiture of the charter and articles of incorporation of the company.

Petitioner says at page 9 of his original brief "that what is here involved is not a proceeding for dissolution but one of forfeiture of the license or charter of a corporation. The two things are quite distinct". If this does not involve a proceeding for dissolution, then for what purpose is it argued that dissolution can only be effected when the certificate of dissolution has been published, and why ask for the appointment of a receiver as a means of effecting the dissolution? See the motion for appointment of receiver.

Our opponents may say whatever they wish, but the incontrovertible fact is that Rubert Hermanos, Inc., by the judgment rendered by this court has no articles of incorporation or charter and is dissolved. It is impossible to conceive that after a decree of this nature the omission of the Executive Secretary of Puerto Rico to issue the certificate of dissolution or the omission of the officers or directors of the corporation to publish it in case it should be issued, can have the effect of continuing, in conflict with the judicial decree, the life of the corporation. In maintaining that Rubert Hermanos, Inc. will not be dissolved until the certificate of dissolution is published, petitioner relies on the provision of article 26 of the Corporation Law, stating to that effect at page 8 of its original brief:

"Corporations die and are dissolved not when the stockholders agree among themselves, but, as article 26 of the Law of Corporations (Code of Commerce, 1932 edition, page 355) provides, when the executive Secretary issues the certificate of dissolution and this certificate is published during four consecutive weeks in a newspaper of this island."

We are not dealing with a voluntary dissolution—the kind of dissolution to which article 26 of the Law of Corporations refers. We are dealing with the forfeiture of the charter and articles of incorporation judicially decreed.

In Puerto Rico, as in the various states and territories of the United States, there exist two kinds of dissolution of corporations. Voluntary and involuntary. For voluntary dissolution the surrender of the franchise of the corporation and the consent of the Government to such surrender are necessary. Such voluntary dissolution is effected in Puerto Rico in the form provided by article 26 of the Law of Corporations entitled "Law to put in force a law of private corporations". The consent of the Government is evidenced by a certificate issued by the Executive Secretary of Puerto Rico, as provided in said article 26. Involuntary dissolution occurs (1) when the legislature repeals the franchises; (2) when the dissolution is decreed by a competent tribunal in a proceeding of quo warranto. A corporation is also dissolved by expiration of the term for which it was organized in accordance with the articles of incorporation. In this last case the dissolution is effected by operation of law. In the cases of repeal of franchise by the legislature or a decree of dissolution made by a court in a proceeding of quo warranto, the dissolution results from the law repealing the franchise or from the judgment. In neither of the two cases of involuntary dissolution is the intervention of the executive secretary necessary, who has neither discretion nor power other than to take note of the law or decree that effects the dissolution. Neither has the Attorney General nor any other officer of Puerto Rico power to review or obstruct a dissolution decreed by the legislative power or by the judicial power.

As we have said; a corporation is dissolved by virtue and effect of a judgment of a court in a proceeding of quo warranto as soon as such judgment becomes final.

"Judgment against corporation.—The effect of a judgment of ouster against a school district is immediately to dissolve the corporation, work its dissolution, and take away all its rights, liberties, privileges and franchises. The dissolution of a municipal corporation by the judgment of the court on quo warranto operates as an absolute revocation of all power and authority on the part of others to act in its name or behalf; but after a judgment of ouster and dissolution has been rendered against a private corporation, it is a matter of indifference to the state that a new corporation, complying with the general law relating to the organization of corporations, has appropriated and is using the name of the extinct corporation." 51 C. J., page 362.

"Where the dissolution proceedings are had under statute, dissolution takes effect as of the time designated by the statute. The general rule is that in case of an ipso facto dissolution it takes effect as an effectual and legal dissolution immediately on the forfeiture of the charter of the corporation, except where certain initial steps are by statute made necessary conditions precedent; but that in the case of a dissolution under judicial proceedings the dissolution takes effect as an effectual and legal dissolution only on the judicial determination of a competent court or tribunal." 19 C. J. S. p. 1413.

"Although there is some authority to the contrary, the general rule is, unless a statute otherwise provides, that the effect of a dissolution of a corporation is to put an end to its existence for all purposes whatsoever and to destroy every one of the faculties possessed by it, dissolution constituting corporate death, so that thereafter it cannot make by-laws or hold meetings; and, as discussed in detail in the sections

following, it can no longer make or take contracts or sue or be sued, all actions by or against it abate, all debts to or from it become extinguished, its real property reverts to the grantors or donors thereof or their heirs, and its personal property escheats." 19 C. J. S. 1486.

"The common law rule that dissolution of a corporation completely terminates its existence is generally modified by statutes regulating the duties, powers, responsibilities and liabilities of corporations after dissolution, and under such statutes a corporation may continue to have a limited existence for some purposes even after its dissolution, during the statutory period of continuance. Although dissolution destroys a corporation's power to continue its business under the charter, it still exists for the purpose of winding up its business and closing its affairs. Under the right to continue its business for winding up purposes, the corporation has authority to do whatever is necessary as an incident to such winding up, and the rights of claimants to corporate funds are fixed as of the date of the decree of dissolution." 19 C. J. S. p. 1487.

See: Fletcher Cyc. Corporations (permanent edition) sec. 8114.

Article 27 of the Law of Corporations of Puerto Rico continues the corporate life for certain purposes after dissolution:

"All corporations, whether they expire through the limitation contained in the articles of incorporation, or are annulled by the Legislature, or otherwise dissolved, shall be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital; but not for the purpose of continuing the business for which they were established."

Sections 26 and 26 (a) of the "Act to establish a Law of Private Corporations" provide the methods for the dissolution of do-

mestic corporations; section 26 as to corporations that have engaged in business, and 26 (a) as to corporations that no part of their capital has been paid in and have not engaged in business. The provisions of section 26, we repeat, refer and are only applicable to voluntary dissolutions and have no application whatsoever to involuntary dissolutions.

Attorneys for petitioner and the office of the Executive Secretary of Puerto Rico have knowledge of the judgment rendered by this court dissolving Rubert Hermanos, Inc. In their original brief they omit to mention the fact that a certified copy of this judgment was filed in the office of the Executive Secretary on the 28th of March, 1940, with a petition signed by all the stockholders requesting that the Secretary should make an entry of said judgment dissolving Rubert Hermanos, Inc. Neither do the attorneys for petitioner advise the court in their original brief, that since the 29th of March, 1940, the attorneys for the Government had knowledge of the fact that this petition had been filed. They also did not inform the court that the Department of Justice had been consulted by the Executive Secretary of Puerto Rico, immediately upon such petition having been filed, of the fact that it had been filed and they attached to said original brief a certificate issued by the Assistant Executive Secretary of Puerto Rico which is manifestly mistaken because it expresses an opinion which the Executive Secretary is not authorized to give and because it does not place the court in possession of the facts necessary to form an opinion. For example: in said certificate the Assistant Executive Secretary of Puerto Rico certifies that from the records of his office it appears that Rubert Hermanos, Inc. is a corporation organized under the laws of Puerto Rico and has not been dissolved up to the date of the certificate in any of the forms provided by law, but makes no reference in said certificate to the petition filed by the stockholders of Rubert Hermanos, Inc. accompanying copy of the judgment rendered by this court and requesting that he take note of the same and of the dissolution of the company. Upon reading the certificate of the Assistant Executive Secretary

of Puerto Rico filed with the original brief of petitioner, and noting that he made no reference whatsoever to the filing of said petition, we requested the Executive Secretary of Puerto Rico to issue a certificate showing that said petition had been filed on the 28th of March, 1940, that is, almost four months ago. We attach said certificate to this brief. There is also attached to this brief a letter addressed by the Assistant Executive Secretary of Puerto Rico, on the 10th of July, 1940, to the undersigned attorneys, and we wish to call particularly to the attention of the court the last paragraph of said letter which reads as follows:

> "Please be advised that immediately upon receipt of the petition for dissolution this office took proper steps to obtain legal advice as to the course to be pursued and will terminate this matter as soon as we receive indications as to the correct procedure."

If necessity or occasion to do so arises, we will present evidence to show that immediately upon receipt in the office of the Executive Secretary of Puerto Rico of the petition filed by the stockholders of Rubert Hermanos, Inc., requesting that he should take note of the judgment and dissolution of the company, the office of the Executive Secretary of Puerto Rico consulted the department of justice as to the action that should be taken in regard to said petition, and that in spite of some four months having elapsed since this request for an opinion it has not been answered. In other words, we are dealing with a very peculiar case. The representatives of petitioner, The People of Puerto Rico, contend that Rubert Hermanos, Inc. is not dissolved because the Executive Secretary of Puerto Rico has not issued the certificate of dissolution and therefore that the certificate has not been published, contending, furthermore, that the said certificate and its publication are necessary in order that Rubert Hermanos, Inc. be considered dissolved. Nevertheless, they have been consulted as to the action that the Executive Secretary should take with regard to the above-mentioned petition and they have not given the Executive Secre-

tary any opinion or advice. If the representatives of the Government understand that it is a prerequisite for the dissolution that the certificate of dissolution be issued and published, they should have given the necessary instructions to the Executive Secretary to act. As long as the office of the Executive Secretary does not receive an answer to its consultation it believes that it should not do anything. In other words, if the certificate is necessary—and we maintain it is not—the fact that it has not been issued can not be the fault of the officers or directors of the extinct corporation but is the fault of the representatives of petitioner who contend that a specific act should be taken or carried out and at the same time obstruct its being done.

VIII.

Rubert Hermanos, Inc. disposed of its properties and the representatives of petitioner have known this since the 29th of March, 1940.

The attorneys for The People of Puerto Rico, in their original brief, at page 8, say:

> "The opposing gentlemen allege that the respondent has transferred its properties. And neither do they make any proof regarding this fact. On the contrary, the lis pendens appearing in the record was inscribed in the Registry of Property. We do not know the properties to which the opposing parties refer."

Let us see whether they did or did not know. On the 29th of March, 1940, the following letter was sent to the Attorney General of Puerto Rico:

> "San Juan, P. R., March 29, 1940.
>
> "Honorable Attorney General of Puerto Rico, San Juan, Puerto Rico.
>
> "Sir: The judgment that was entered by the Honorable Supreme Court of Puerto Rico against Rubert Hermanos, Inc. has been affirmed by the Honorable Supreme Court of

the United States and the said Company has had to comply with said judgment. It has been liquidated, transferring its properties to a partnership composed of those who were its only stockholders a l in effect the owners of its properties—a method that was e emed to be the only one available legally and economically, to effect the dissolution and liquidation and avoid serious and unnecessary prejudice to the stockholders.

"Nevertheless, and although it is against the interest and desire of the interested parties, in view of the uncertainty and uneasiness through which the sugar industry is passing and the threats that are hanging over it for the future, the said partnership is willing, if the Government of the United States or The People of Puerto Rico desire to acquire the properties composing Central San Vicente, including the factory and all the lands, to sell the same under conditions that are legal, reasonable and just, inasmuch as we presume that the Government has not the intention or the purpose of sacrificing investments made in the best of good faith during a long period of years.

(signed) MANUEL GONZALEZ
ANA MARIA HERNANDEZ DE GONZALEZ
JOSE GONZALEZ
RAFAEL MARTINEZ DOMINGUEZ."

This letter was never answered.

We do not wish to comment.

As to the statement that we have made no proof of the fact that Rubert Hermanos, Inc. has disposed of its properties, we will limit ourselves to say that with reference to the incident regarding the appointment of a receiver the court only has before it the motion and the answer and that it has not been opened for the presentation of evidence. If the occasion or necessity arise to prove that Rubert Hermanos, Inc. disposed of its properties, as the Attorney General of Puerto Rico was opportunely advised,

and that Rubert Hermanos, Inc. is not the owner of any property, the necessary proof, which will be conclusive and definite, will be presented.

IX.

The liquidating trustees have capacity to oppose the appointment of a receiver.

We do not believe that the attorneys for petitioner seriously deny that the persons that appear in the opposition and answer to the motion for appointment of a receiver were directors of defendant corporation. This is a fact that appears from public records.

If what the attorneys for petitioner desire to allege is that those who were the directors of the extinct corporation are not its liquidators and have no right to appear as such in this proceeding, they should know that the law of corporations confers this right in its articles 28, 29, 31 and 32, which read as follows:

> "Section 28.—*Directors as Trustees Pending Dissolution.*—Upon the dissolution in any manner of a corporation, the directors shall be the trustees thereof pending the liquidation, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, so far as such moneys and property shall suffice. They shall have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority of the said trustees, to prescribe the terms and conditions of the sale of such property, or may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of the said property. In case of a vacancy or vacancies in the board of directors of such corporation existing at the time of dissolution or occurring subsequently thereto, the surviving directors or director shall be the trustees or trustee thereof, as the case may be, with full power to settle the

affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them, and to do and perform all such other acts as shall be necessary to carry out the provisions of this Act relative to the winding up of the affairs of such corporation and to the distribution of its assets.

"Section 29.—*Powers and Liabilities of Trustees in Liquidation.*—The directors constituted trustees as aforesaid shall have power to sue for and recover the aforesaid debts and property by the name of the corporation and shall be suable by the same name, or in their own names or individual capacities for the debts owing by such corporation, and shall be jointly and severally responsible for such debts to the amount of the money and property of the corporation which shall come to their hands or possession as such trustees."

"Section 31.—*Distribution of Assets by Trustees or Liquidators.*—The said trustees or liquidators shall pay ratably, so far as its assets shall enable them, all the creditors for the corporation who prove their debts in the manner directed by the court or by the law of civil procedure. If any balance remain after the payment of such debts and necessary expense, the same shall be distributed among the stockholders.

"Section 32.—*Pending Suits not Affected by Dissolution.*—Any suit now pending or hereafter to be begun against any corporation which may become dissolved before final judgment, shall not lapse by reason of such dissolution; but no judgment shall be entered in any such action except upon notice to the trustees or liquidators of the corporation."

Identical or similar statutory provisions have been interpreted and applied repeatedly by the courts. The right of the directors, in their character of liquidators, to appear in suits affecting the corporation, whether as plaintiffs or as defendants, under statutes of this nature, is well established.

"In many states statutes have been enacted designating the directors of a dissolved corporation as its trustees or providing for the judicial appointment of trustees for the dissolved corporation. Such statutes do not impair the obligation of the contracts of creditors.

"The preponderance of authority in respect of such statutes is in favor of the doctrine that the general term 'dissolution' is applicable to dissolution produced by the forfeiture of corporate charters; but in some jurisdictions the position has been take that only voluntary dissolutions are within the purview of the statutes in which this term is used without qualification." (13 Am. Jur., p. 1202.)

"In some states it has been laid down that trustees of dissolved corporations are empowered to sue in the name of the defunct corporations.

"In most jurisdictions, however, the clauses by which their procedural capacity is defined have been construed as importing simply that in any action involving the claims or liabilities of a defunct corporation, the trustees are ordinarily the proper parties plaintiff or defendant." (13 Am. Jur., pages 1204, 1205.)

"Generally, the trustees of a defunct corporation as such may sue and, conversely, suit may also be brought against them. In addition to their powers of maintaining and defending actions pending at the time of the dissolution, trustees have power to confess judgment on indebtedness which the corporation cannot pay." (19 C.J.S. pages 1518, 1519.)

General Ry. Signal Co. v. *Cade et al.*, 106 N.Y.S. 729.

Attorneys for petitioner allege that there has been no proof presented to show that the parties opposing the motion for appointment of a receiver are as a matter of fact the liquidating trustees and as to this we should repeat that the court has nothing before it except the motion and answer and that neither party has presented proof because the court has not asked for it. If the

necessity should arise it will be very easy to show that the opposing parties are in fact trustees-liquidators of Rubert Hermanos, Inc.

X.

The jurisprudence cited by petitioner is inapplicable.

To sustain their contention that the Government may request the appointment of a receiver in quo warranto cases, the petitioner cites three decisions of the Supreme Court of Texas; *East Line Red River Co.* v. *State*, 12 S.W. 690, 696; *Texas Trunk R. Co.* v. *State ex rel.*, 18 S. W. 199; *San Antonio Gas Co.* v. *State*, 54 S.W. 289, 294.

These cases establish a minority doctrine. The general, the best doctrine, which is the majority doctrine, is that of *Haiemeyer* v. *Superior Court*, 84 Cal. 327, and that of other cases cited in our first brief.

> "In proceeding by attorney general.—It has been held that, after forfeiture and cancellation of a corporation's charter by the state charter board for failure to make required reports, the state in a proceeding by the attorney general may sue for formal dissolution and to enforce a faithful settlement of the corporation's affairs; and in such suit the court may appoint a receiver. As a general rule, however, in the absence of statutory authority, a court has no jurisdiction to appoint a receiver on motion of the attorney general in quo warranto proceedings; and even where a statute does authorize appointment by the court of a receiver in quo warranto proceedings by the attorney general, but restricts its power of appointment to cases of dissolved corporations, the affairs of which have not been settled and adjusted it has been held that a court has no power under its provisions to make an appointment where the corporation had made an assignment before the proceedings in quo warranto had begun, and the assignee had entered on his duties, under direction of a court of competent jurisdiction.

Statutes authorizing a court to appoint a receiver in any action brought by a creditor, stockholder or member for the dissolution of a corporation, or upon the dissolution of any corporation', do not authorize such appointment in actions brought by the attorney general, or after a judgment has been entered against a corporation by the attorney general ousting it from usurping certain privileges and franchises not conferred upon it by its charter; nor is an appointment of a receiver pendente lite during the pendency of an appeal, in action by the attorney general, authorized by such statute; nor is this construction of the statute affected by other provisions of the statute authorizing the directors to take charge and administer as trustees, unless other persons are appointed by the court.' On the other hand, a statute which directs the attorney general to institute actions for dissolution on certain grounds stated, and authorizes the court to appoint a receiver on judgments of involuntary dissolution, does not restrict the court's power of appointment to actions instituted by the attorney general." (19 C. J. S. sec. 1748, page 1524.)

"Where, under the rules stated supra sub-division (a) of this section, an application for a receiver is necessary, any individual having an interest may apply for the appointment of a receiver; and hence, application therefor may be made by a stockholder or a creditor, as parties interested, and statutes generally so provide. Although the contrary view has been taken, it has been held that where the charter has already been forfeited, the state has no interest in the subsequent winding up sufficient to sustain an application by it for a receiver." (19 C. J. S. sec. 1750, page 1526.)

"*Who may apply for.*—The persons who may apply for a receiver will depend upon the particular statute under which his appointment is authorized. Generally the statutes allow the application to be made by any creditor or stockholder.

"Whether a receiver may be appointed in a suit by the state to forfeit a charter, on the application of the state or otherwise, has been decided differently in various states, largely according to the particular wording of the governing statute, although sometimes without any reference thereto. In Indiana, the statute expressly authorizes the appointment of a receiver in such case. In a New York case it was held that when the charter of a corporation is forfeited in proceedings under a statute because of its suspension of business for a certain period, the judgment may properly include the appointment of a receiver, so in Texas, on forfeiture at the suit of the state, the statute authorizing the appointment of a receiver is construed as empowering the court to appoint a receiver without the application of any person interested in the property. On the other hand, where not provided for by statute, it has been held in Pennsylvania, Mississippi and Wisconsin that the court has no power to appoint a receiver for a corporation on motion of the state or commonwealth in quo warranto proceedings to forfeit its charter. In California, the governing statutes of that state after being exhaustively reviewed by the courts, are construed as not warranting the appointment of a receiver in connection with an action by the state to forfeit a charter, but only on the application of a stockholder or creditor. So it seems that, in California, if the suit is brought by the state to forfeit a charter, the court has no authority, on its own motion, to appoint a receiver." (8 Fletcher, page 9245, sec. 5660.)

We repeat what we have stated in our first brief, that the doctrine established by the Supreme Court of California has been established interpreting laws similar to our laws.

The Texas cases cited by our opponents furthermore are clearly inapplicable for the following reasons:

(a) In the three cases the defendant companies were public service companies. For that reason the court understood that a

receiver should be appointed in order that the properties could continue dedicated and applied to the public object or purpose for which the companies were organized.

(b) In the three cases in the petition or information of quo warranto the appointment of a receiver was requested as a part of the final judgment to be rendered by the court.

(c) In the three cases the appointment of a receiver was decreed in the final judgment sustaining the information.

(d) In the three cases the receiver would take possession of the properties subject to just claims that might be presented by any one having interest.

In this case the appointment of a receiver is requested for an entirely different purpose. That is, in order that the properties that according to the petitioner still belong to Rubert Hermanos, Inc., should pass not to those who have a right to them, but to the Government of Puerto Rico or third persons that might be interested in the purchase of the same at public auction and the appointment of a receiver is requested to maintain the status quo until the Government of Puerto Rico makes use of the option of confiscation or sale at public auction, it having been demonstrated that such option exists and that this proceeding was finally terminated when the judgment entered by this Honorable Court on the 30th of June, 1938, was affirmed.

CONCLUSION.

It is obvious that under no theory may an appointment of receiver be made in this case.

Wherefore it is respectfully prayed that this Honorable Court deny the motion for appointment of a receiver.

San Juan, P. R., July 15, 1940.

Respectfully submitted,

JAIME SIFRE, JR.,
HENRI BROWN,
Attorneys for Respondent, RUBERT HERMANOS, INC.

Notified with copy this fifteenth day of July, 1940.

GEORGE A. MALCOM,
Attorney General of Puerto Rico,
by MIGUEL GUERRA-MONDRAGON,
RAFAEL RIVERA-ZAYAS,
LUIS VENEGAS-CORTES,
Associate Attorneys.

Government of Puerto Rico.
Office of the Executive Secretary.

San Juan, July 10, 1940.

Messrs Henri Brown and Jaime Sifre, Jr., San Juan, P. R.

Gentlemen: Receipt is acknowledged of your request dated on the 9th instant, for issuance of a certificate covering a document filed in this office by the stockholders of Rubert Hermanos, Inc.

We have prepared the certificate to the effect that on March 28, 1940, there was filed in this office a statement from the stockholders of Rubert Hermanos, Inc., giving consent to the dissolution of said corporation and requesting this office to take note of such dissolution, which document was duly accompanied by a certified copy of a decree of the Supreme Court dated July 30, 1938. The certificate which we are issuing quotes the petition from the stockholders.

We take this opportunity to advise you that the fees to cover the issuance of the certificate amount to $1.20 in internal revenue stamps.

Please be advised that immediately upon receipt of the petition for dissolution this office took proper steps to obtain legal advice as to the course to be pursued and will terminate this matter as soon as we receive indications as to the correct procedure.

Respectfully,

E. D. BROWN,
Acting Executive Secretary.

The People of Puerto Rico.
Office of the Executive Secretary.

Know All Men By These Presents:

That in accordance with a request of Messrs. Henri Brown and Jaime Sifre, Jr., of San Juan, Puerto Rico, dated July 9, 1940, I, L. D. Brown, Acting Executive Secretary of Puerto Rico; do hereby certify: That from the records of this office it appears that "Rubert Hermanos, Incorporada" is a corporation organized under the laws of Puerto Rico and that the following is a true and correct transcript of a statement executed under oath by all the stockholders of said corporation, presented in this office on March 28, 1940, declaring that in compliance with the decree of the Supreme Court in the case of *"The People of Puerto Rico* v. *Rubert Hermanos, Inc."* quo warranto, dated July 30, 1938, certified copy of which decree said stockholders submitted with said statement, they gave consent to the dissolution of said corporation and requested this office to take note of such dissolution:

"The undersigned, being all the stockholders of the corporation Rubert Hermanos, Inc., desiring to comply with the decree of the Supreme Court of Puerto Rico in case number 2, entitled *"The People of Puerto Rico* vs. *Rubert Hermanos, Inc."* quo warranto, dated July 30, 1938, copy of which is attached, do hereby request the Executive Secretary of Puerto Rico to take note of the dissolution of said corporation.

"In testimony whereof we sign these present, this 27th day of March, 1940.

(s) M. Gonzalez
(s) Manuel Gonzalez Hernandez
(s) Ramon Gonzalez
(s) Ana Maria H. De Gonzalez
(s) Jose Gonzalez
(s) Rafael Martinez Dominguez

"The People of Puerto Rico
Municipality of San Juan

Manuel Gonzalez Martinez, President, and Gabriel Soler, Secretary, of Rubert Hermanos, Inc., duly sworn declare that the foregoing petition for dissolution of said corporation has been signed by all the stockholders of the same.

(s) M. Gonzalez, President
(s) G. Soler, Secretary

Affidavit No. 2914.

Subscribed and sworn to before me this 27th day of March 1940 in the city of San Juan, P. R., by Manuel Gonzalez Martinez and Gabriel Soler.

(s) Raul Benedicto,
Notary Public.

(NOTARIAL SEAL)

(25¢ internal revenue stamp cancelled.)"

In witness whereof, I have hereunto set my hand and caused to be affixed the Great Seal of Puerto Rico at the City of San Juan, this tenth day of July, A.D., nineteen hundred and forty.

E. D. BROWN,
Acting Executive Secretary.

[Title omitted.]

OPINION OF THE COURT

BY ASSOCIATE JUSTICE MR. TRAVIESO.

San Juan, Puerto Rico, July 26, 1940.

By decree entered on July 30, 1938 by this Supreme Court (53 DPR 779), affirmed by the Supreme Court of the United States on March 25, 1940, the forfeiture and cancellation of the license and of the Articles of Incorporation of the defendant Rubert Hermanos, Inc. was decreed and at the same time the immediate dissolution of said corporation and the liquidation of its affairs was ordered.

Complainant now requests the appointment of a receiver under whose direction and control this court should effectuate the liquidation of said defendant corporation.

In the opposition to the appointment of a receiver, the liquidating trustees of the defendant corporation alleged: That the judgment has been complied with, the corporation having been dissolved, its obligations extinguished and its properties transferred by consent of its stockholders and liquidators; that this court is without jurisdiction to appoint a receiver, because the quo warranto law grants no authority for that; that the motion is insufficient and does not state facts justifying the appointment of a receiver; that the appointment of a receiver would deprive those who were the stockholders of the corporation of their rights and properties without due process of law; and finally, that the appointment of a receiver would constitute legislation by the court and violate the prohibition of the Organic Law of Puerto Rico against *ex post facto* laws.

The first question which we should consider and decide is that relating to the alleged lack of jurisdiction by this Supreme Court to appoint a receiver with powers to liquidate the business of the corporation which was decreed by judgment of this same court.

It is beyond all argument that this Supreme Court, when it entered judgment decreeing the forfeiture and cancellation of the license and the articles of incorporation of the defendant and ordering its dissolution and liquidation, acted within the jurisdiction expressly conferred by Law No. 47 of August 7, 1935. It was so held by the Federal Supreme Court in affirming the said decree and in returning the said case to this Supreme Court for further proceedings. We do not believe that it can be sustained with probabilities of success, that a court of justice with jurisdiction to enter a judgment does not have jurisdiction to order, intervene in and direct its enforcement. It would be anomalous if this court, after having found defendant guilty of having violated the Organic Law, the Corporation Law and its own articles of incorporation, and after having imposed the payment of a fine, and decreed the

forfeiture of its articles of incorporation and the dissolution and liquidation, should find itself obligated, for lack of jurisdiction, to cross its arms, leaving the stockholders and directors of such defendant, the real guilty parties of such violations, in complete freedom of action to comply with the decree of this court as and when they might wish. We are of the opinion that the authority granted to this Supreme Court to entertain these proceedings of quo warranto and to enter a judgment as that rendered in the present case, impliedly carries with it the power to compel the compliance with the said judgment through the appointment of a receiver.

Article 182 of the Code of Civil Procedure authorizes the appointment of a receiver by the court in which an action may be pending or which may have been decided. And paragraph 4 of the same article provides that a receiver may be appointed in cases in which a corporation has been dissolved or which may be insolvent or in imminent danger of insolvency *or which has lost its rights as such corporation.*

The quo warranto proceedings did not terminate when the judgment was affirmed by the Federal Supreme Court. This court retained its jurisdiction over the defendant corporation and over its properties to compel compliance with the judgment and until the judgment rendered by it has been complied with. We are not dealing in this case with a voluntary dissolution agreed upon by the stockholders, but of a case in which the corporation has lost all its rights as such by judicial decree.

There is another fundamental reason for this court to retain its jurisdiction over the properties which the defendant corporation possessed in violation of the law and of its articles of incorporation. Law No. 47 of August 7, 1935, by its section 2, second paragraph, grants to The People of Puerto Rico an option to institute within the same proceedings of *quo warranto* the confiscation in its favor or the sale at public auction, of the properties illegally possessed by the extinct corporation, within a term of six months counted from the date on which such judgment becomes final

and such term does not expire until the 13th of November, 1940. If the so-called *liquidating trustees* should be permitted to perform by themselves the liquidation of the business and the conveyance of the properties of the extinct corporation, without the intervention and supervision of this court, the fundamental object of the law and the public policy which motivated the institution of these proceedings would be defeated and The People of Puerto Rico dispossessed of its option by the simple transfer of the properties to another person.

The opposition of the liquidating trustees based on the fact that the judgment of this court has already been complied with, the obligations of the corporation satisfied and its properties sold, because it was so agreed by them and the stockholders cannot be taken into consideration, first, because said liquidating trustees have not proved in any manner their capacity and personality nor have they offered any evidence to substantiate their allegations, an opposition not even having been sworn to; and second, because in our judgment all said acts done after the date of the judgment which ended the legal existence of the defendant corporation are legally void.

When a corporation is dissolved by a valid judgment declaring the forfeiture of its charter, from that moment on it ceases to exist for all purposes, unless there is some statutory provision continuing its existence, and it is without any power to contract or to acquire, possess or transfer properties, or to sue or to be sued, or to exercise any other franchise or powers granted by its articles of incorporation. See: *Greenwood* v. *Union Freight R. Co.*, 105 U.S. 13, 26 L. Ed. 961; *Thornton* v. *Marginal Freight R. Co.*, 123 Mass. 32; *Bradley* v. *Reppell*, 133 Mo. 545, 54 Am. St. Rep. 685; Fletcher Cyc. of Corporations, Vol. 8, sec. 5564.

Our attention has not been called to any statute of Puerto Rico providing that a corporation which has ceased to exist by virtue of a judicial judgment continues having legal existence to liquidate its affairs and sell its property without the intervention or permission of the court. The provisions of our corporation law

(Section VI, arts. 27 and 28) are applicable only to a voluntary dissolution agreed upon by the shareholders of a corporation or by expiration of the term fixed for its duration.

Once the dissolution of a corporation has been decreed it may not accept nor make a transfer of properties unless there should be a statute extending its corporate existence for the purposes of its liquidation. It has been decided in Louisiana that when a court has acquired jurisdiction over all the property of a corporation from the date on which the estate commences an action for the cancellation of the charter, the property, once that the litigation has started, may not be taken over by liquidators appointed subsequent thereto in relation with the voluntary dissolution. *State* v. *People's Fire Ins. Co. of New Orleans,* 126 La. 548, 52 So. 763.

The present case is not an ordinary case of dissolution of a corporation because of violation of the provisions of its articles of incorporation. As was said by the Federal Supreme Court in its opinion affirming the judgment of this court, "the question here in controversy is a matter of great importance to Puerto Rico and involves the power of its Legislature to enforce Congressional policies affecting the island". This is a case of an agricultural corporation, which in violation of its charter, of the Corporation Law and of the Organic Act got to control about 12,188 acres of lands fit for the cultivation of sugar cane. Taking into account the public policy of the National Congress and the interest of the insular community in the dissolution of such large concentrations of arable lands in the hands of corporations and of fomenting the creation of the greater number of owners of small parcels of land, the insular Legislature granted to The People of Puerto Rico the option of acquiring for itself, through the corresponding indemnity, or of forcing the sale at public auction of the lands illegally possessed by a corporation dissolved through a judicial decree.

The decree of dissolution can not be complied with by the extinct corporation or by its liquidators through the disposition of

the properties, until such time as the option granted to The People of Puerto Rico shall have expired. The receivership is without any doubt the most adequate remedy for the protection of the public interest of the shareholders and of the creditors, should there be any.

In *San Antonio Gas Co.* v. *State*, 54 S. W. 289, 293–294, it was said:

> "To whom shall the property of the defunct corporation be intrusted, if no receiver be appointed? Appellant answers, to the president and board of directors of the defunct corporation. Article 682, Sayles' Rev. Civ. St., is the only statute that provides that the president and board of directors shall be trustees and take possession of the property of the corporation, and such provision is made only in cases of the dissolution of a corporation. *That the statute draws a distinction between a dissolution and the forfeiture of a charter is shown by the language of section 3, art. 1465, Id.*, where provision is made for a receiver in case of dissolution, insolvency, or forfeiture. When a charter is forfeited, the life of the corporation ceases, and no president and board of directors can survive it, and, unless specially authorized by statute, could not, by virtue of their offices, take control of the property of the corporation. If article 682 could apply to cases in which there has been a forfeiture of a charter by the state, it can only apply when no receiver has been appointed by some court of competent authority. If it be necessary to justify the power given by statute, it may be well to remember that appellant in this case is a quasi public corporation, and for the protection of the public interests it was necessary that a receiver should be appointed. To place the property again in the hands of the officers of the corporation would be to return it to the custody of those who had failed to perform their trust, and had violated the laws of the state, and the public interests would not be subserved

thereby. We call attention, in this connection, to *People* v. *Ice Co.*, 18 Abb. Prac. 382, and *Herring* v. *Railroad Co.* 105 N.Y. 340, 12 N.E. 763.

"That the appointment of a receiver will have the effect of a fine inflicted upon the shareholders in the defunct corporation can have no weight in the decision of a court. The statute plainly confides the authority to the court to make the appointment, and that it will bear heavily upon the shareholders is a matter for legislative, and not judicial, consideration. In this case, at least, the violators of the law will be the ones who will suffer from the appointment of a receiver. We have treated the question of a receivership as though it was an open one in Texas, but it is not. The statute has been construed by the supreme court, and it was held that the trial court, when a charter is forfeited, has the authority, under the statute, to appoint a receiver at the instance of the state, independent of the request of a creditor."

See: *Conlan* v. *Oudin*, 94 P. 1074; *Herring* v. *New York & W. R. Co.*, 12 N.E. 763, 781; *State* v. *Municipal Saving & Loan Co.*, 14 N.E. 736; *Eel River Co., etc.*, 57 N.E. 388; 14 A.C.J. 1140, sec. 3777.

Our attention has been called to the case of *Havemeyer* v. *Superior Court*, 84 Cal. 327, 24 Pac. 121, in which it was decided that in the case of the forfeiture and cancellation of the franchise of a corporation, a receiver may only be appointed at the request of an interested party. The said case does not help in any way the contention of the opposers. In the first place, we have already stated that The People of Puerto Rico is an interested party in the appointment of a receiver, for the protection of the right granted by section 2 Par. 2, of the Quo Warranto Law. Our statute (art. 182 C. of Civ. Pro.) grants us the discretional power to appoint a receiver when the forfeiture of a corporation is decreed, without the necessity of the filing of any petition by any interested party in the corporate property. In this case, we repeat,

a petition has been presented by an interested party in the future holding of lands illegally possessed by the defunct corporation.

For the stated reasons the motion of complainant should be granted.

MARTIN TRAVIESO,
Associate Justice.

[Title omitted.]

ORDER.

San Juan, Puerto Rico, July 26, 1940.

(By the court at the proposal of Associate Justice Mr. Travieso.)

The motion of The People of Puerto Rico for the appointment of a receiver who in complying with the decree of this court should proceed to liquidate the business of the extinct defendant corporation having been heard; and the parties hereto having argued for and against said motion;

For the reasons stated and the jurisprudence cited in the opinion of this date, the complainant's motion is granted and Mr. Jaime Annexy Iglesias, engineer and a resident of San Juan, is hereby appointed receiver for the extinct defendant corporation with all the authority and powers inherent to the same, and especially the following:

1. To take and maintain possession of all the properties and especially of the lands which in violation of the law were possessed by the corporation Rubert Hermanos, Inc.; to continue managing said properties and cultivating the lands in the same manner as has been done heretofore by the directors and officers of the said corporation, maintaining the buildings, factory and machinery in good state of conservation and operation and fomenting and cultivating the plantations with the object that they shall produce the greatest yield for the benefit of the creditors and stockholders of said corporation;

2. To employ, compensate and dismiss from time to time and in his discretion, all workmen, servants, agents and attorneys as

may be necessary; purchase and pay for materials and accessories needed; settle with creditors all claims in the ordinary course of business; pay all taxes on the properties which may be due or may become due during his administration; to initiate and defend without the necessity of an ulterior order of the court, all pending actions in pro or against said corporation; defend all actions which in the future might be established against said corporation or against him as such receiver, with leave of this court, and pay the expenses of said actions and defenses; file and proceed with all actions in law or in equity or extraordinary proceedings which might be necessary for the purpose of obtaining the possession and control of any property of the defendant corporation; to do all that may be necessary and adequate to maintain and preserve the business established by the defendant corporation until subsequent order of this court or of the Judge who may act in its representation during the period of its vacation, and to pay the sums for such purpose which might in the future be ordered by this court or by the Acting Judge at the request of said receiver and after he has been heard; give all security which might be necessary to secure loans of funds in interest of the trust confided to said receiver by these presents;

3. As soon as said receiver shall have entered in the compliance of his duties, he shall make a true and complete inventory of each and all the properties and other belongings movable or immovable of every class and description of which he has been appointed receiver, or which might come into his possession, and shall file said inventory with the clerk of this court after having notified the attorneys for both sides. Said receiver shall keep true and exact accounts of each and all of his acts and transactions respecting the receivership; and shall file in the office of the clerk such accounts at the end of the receivership, serving copy thereof to the attorneys for both parties;

4. All moneys coming into the hands of said receiver as such shall be deposited by him in his name in one or more banks of deposit in the Island of Puerto Rico with the approval of this

court or of the Judge of same, who may be acting during vacation, against which deposits the said receiver shall have the right to draw by his personal order or by order of his agents or attorneys;

5. If the said receiver should use due prudence and diligence in their selection, he shall not be responsible for the illegal acts of his servants and agents;

6. The said receiver shall not incur in any personal responsibility for the management of the business of the receivership by reason of any act of his as such receiver or the acts of his servants, agents or attorneys, provided that said receiver acts in good faith and in the exercise of his best discretion and prudence;

7. The receiver appointed by these presents is expressly authorized, should The People of Puerto Rico in the exercise of its right specifically granted by sec. 2, Par. Second of Act No. 47 of August 7, 1935, urge the confiscation in its favor of the immovable property illegally possessed by said corporation, to convey said property to The People of Puerto Rico upon the payment by it of the indemnization which might be fixed in the form established in the Law of Eminent Domain; and should The People of Puerto Rico request in accordance with said law the sale at public auction of the said properties, to proceed, in accordance with the plan which shall be submitted to the previous approval of this court or of the judge acting in the name of this court during its vacation, to sell said properties at public auction;

8. The said receiver, before taking possession of his charge and assuming the compliance of his duties, shall make an oath that he shall faithfully comply with all his duties and shall give a bond to be approved as to form and sufficiency by the preceding judge or by the judge of this court who shall act during the vacation, and which bond shall be filed in the office of the clerk of this court in the amount of thirty thousand dollars ($30,000) to guarantee the faithful compliance of his duties as such receiver.

It is further ordered and by these presents the defendant corporation is required, as well as all persons acting in its name or who may derive from it their right as directors, officers, stock-

holders, agents, employees, trustees, liquidators, assignees, lessees or in any other capacity, to, upon presentation of a certified copy of this resolution, deliver and put at the disposal of the receiver herein appointed, any and all the properties of the defendant corporation which might be in their possession or under their control.

It is further ordered that said defendant, its directors, officers and agents, and all those persons, partnerships, or corporations claiming any right by reason of the assignment or transfer made by the defendant corporation or by its representatives or trustees subsequent to the date on which the judgment by which the forfeiture and cancellation of the license and Articles of Incorporation of Rubert Hermanos, Inc., the dissolution of said corporation and the liquidation of its affairs was decreed, refrain from disposing of conveying or selling in any manner movable or immovable property of which they might be in possession or which they may have under their control, and from interfering with or obstructing the receiver or impeding him in any form from taking possession of the said properties of said corporation.

It has been so decided by this court and the Presiding Justice signs. The Associate Justice, Mr. de Jesus did not intervene. The Associate Justice Mr. Wolf agrees with the finding.

EMILIO DEL TORO,
Chief Justice.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Same title.]

EXCEPTION TO THE RESOLUTION AND ORDER OF JULY 26, 1940.

[Filed July 30, 1940.]

Now come Rubert Hermanos, Inc., respondent in the above-entitled case, and Manuel Gonzalez Martinez, Rafael Martinez Dominguez, Jose Gonzalez Hernandez, Aureo Garcia and Gabriel Soler, trustees-liquidators of the aforesaid respondent corporation,

by their undersigned attorneys, and respectfully take exception to the resolution and order appointing a receiver, rendered and entered in the above cause on July 26, 1940.

San Juan, Puerto Rico, July 30, 1940.

HENRI BROWN,
JAIME SIFRE, JR.,
Attorneys for RUBERT HERMANOS, INC., *and for* MANUEL GONZALEZ MARTINEZ, RAFAEL MARTINEZ DOMINGUEZ, JOSE GONZALEZ HERNANDEZ, AUREO GARCIA *and* GABRIEL SOLER, *Trustees-Liquidators of said Corporation.*

[Title omitted.]

ASSIGNMENT OF ERRORS.

[Filed July 30, 1940.]

Now come Rubert Hermanos Inc. defendant in the above-entitled proceeding and Manuel Gonzalez Martinez, Rafael Martinez Dominguez, Jose Gonzalez Hernandez, Aureo Garcia y Gabriel Soler, trustees in liquidation of said defendant corporation Rubert Hermanos Inc. and respectfully submit that in the record, proceedings and resolution, decision and order of the Supreme Court of Puerto Rico entered on July 26, 1940 there is manifest error and filed the following assignments of error upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause:

1. The court erred in holding that the motion for the appointment of a receiver was sufficient to call into exercise judicial discretion or stated grounds upon which the discretion of the court could be exercised.

2. The court erred in holding and deciding that sub-section 4 of section 182 of the Code of Civil Procedure of Puerto Rico makes mandatory rather than discretional the appointment of a

receiver in all cases in which a corporation has been dissolved or has forfeited its corporate rights.

3. The court erred in holding that it had jurisdiction to make and enter an order appointing a receiver of the properties of defendant corporation in the same suit or proceeding after final judgment therein.

4. The court erred in holding that the suit or proceeding in which the said decision and order is made and entered is still pending after final judgment entered therein.

5. The court erred in holding that sub-sections 4 and 5 of section 182 of the Code of Civil Procedure confer authority and jurisdiction to appoint a receiver of the property of a defendant or respondent in a quo warranto proceeding on the petition of The People of Puerto Rico by its Attorney General, and after final judgment of forfeiture and dissolution.

6. The court erred in holding that it had jurisdiction to make the order and decision appealed from which modifies and changes the judgment entered therein on July 30, 1938, after the said judgment became final and the said suit or proceeding was no longer pending in the said court.

7. The court erred in holding that the cause or proceeding of quo warranto was still pending after the judgment of July 30, 1938 became final and that it had power to make and enter further or additional judgments, decrees, orders or decisions finally determining property rights not dealt with in the said judgment of July 30, 1938.

8. The court erred in declining and refusing to follow the rule of law regarding the pendency of actions fixed by section 348 of the Code of Civil Procedure of Puerto Rico.

9. The court erred in imposing in and by its said order and decision the penalties of confiscation or sale at public auction of the properties of the defendant corporation, provided in and by sections 1 and 2 of Act No. 47 of the Legislature of Puerto Rico enacted at Special Session of the 13th Legislature in 1935, and approved August 7, 1935, when such penalties were not prayed for

nor allegations necessary for the imposition of such penalties made in the amended information and the final judgment in the said cause or proceeding did not decree the imposition of such penalties.

10. The court erred in holding that the directors of defendant corporation are not statutory trustees in liquidation of the said corporation after the final judgment forfeiting its charter and ordering its immediate dissolution, under and by virtue of the provisions of sections 28 and 29 and 31 of an act of the Legislature of Puerto Rico entitled "An Act to establish a law of private corporations" approved March 9, 1911.

11. The court erred in holding and deciding that the provisions of sections 27 and 28 of an "Act to establish private corporations" approved March 9, 1911, are applicable only to voluntary dissolutions of corporations by agreement of the stockholders or by the expiration of the term fixed for the duration of a corporation in its articles of incorporation.

12. The court erred in holding and deciding that section 1 of Act No. 47 approved August 7, 1935, construed in connection with the provisions of section 2 of the same act relating to confiscation or sale of properties of corporations whose charters are forfeited and dissolution ordered by a judgment in a quo warranto proceeding or suit fixes a term of six months after such final judgment within which The People of Puerto Rico may elect either to confiscate such properties or have them sold at public auction, instead of holding that the said term of six months is the period within which a sale of such properties decreed in the final judgment must be had.

13. The court erred in holding and deciding that after the initiation of a quo warranto suit or proceeding the defendant corporation is without power to dispose of or alienate its properties.

14. The court erred in holding and deciding that it had power to appoint a receiver of properties owned by defendant corporation in the beginning of the said proceeding or suit subsequently transferred to a civil partnership not a party to the suit and in the

possession of said partnership under claim of title and to order the receiver so appointed to take possession of such properties without hearing or giving an opportunity to such partnership to be heard.

15. The court erred in holding and deciding that its order or decision directing its receiver to take possession of property owned by and in possession of a grantee and transferee of said properties, not a party to the suit, without hearing, does not deprive the said partnership of due process of law in conflict with the provisions of the Organic Act of Puerto Rico.

16. The court erred in declining and refusing to hold that the penalties of confiscation or sale fixed in sections 1 and 2 of Act No. 47 approved August 7, 1935 constitute ex post facto laws in violation of the Organic Law of Puerto Rico.

17. The court erred in declining and refusing to hold that the penalties of confiscation or sale at public auction of properties of defendants in quo warranto provided by Act No. 47 approved March 9, 1935, are not retroactive as to corporations in existence prior to the passage of the said Act and properties acquired prior thereto.

18. The court erred in decreeing and ordering the appointment of a receiver to take possession and dispose of the properties of defendant corporation and its grantee as a punishment for the misconduct for which its charter is forfeited by the final judgment and in refusing to hold that such an order usurps legislative powers and furthermore violates the provisions of the Organic Act of Puerto Rico prohibiting ex post facto laws.

19. The court erred in holding and deciding that the quo warranto law of Puerto Rico or the Code of Civil Procedure of Puerto Rico authorize the appointment of a receiver as a punishment for misconduct of corporations giving rise to a decree or judgment of forfeiture and dissolution in quo warranto proceedings.

20. The court erred in holding that it had jurisdiction after a final decree forfeiting the charter of defendant corporation and

ordering its immediate dissolution and liquidation to appoint a receiver to continue to operate the properties and business of the dissolved corporation for an indefinite period.

21. The court erred in holding and deciding that it had jurisdiction to authorize and empower a receiver appointed after the judgment of forfeiture and dissolution of defendant corporation to borrow money secured by liens on the property of the corporation for the purpose of operating the properties and carrying on the business of the defendant corporation.

22. The Supreme Court of Puerto Rico erred in entering the resolution or order of July 26, 1940.

23. For other errors appearing in the record.

By reason whereof appellants pray that the decision and order appealed from be reversed and set aside.

San Juan, Puerto Rico, July 30, 1940.

HENRI BROWN,
J. SIFRE, JR.,
Attorneys for Appellant.

[Title omitted.]

[Filed July 30, 1940.]

ISLAND OF PUERTO RICO,
DISTRICT OF SAN JUAN, SS.

Jose Gonzalez Hernandez, having been duly sworn, deposes and says:

I was vice-president and a director of the defendant corporation Rubert Hermanos, Inc., and am one of its trustees in liquidation. I have personal knowledge of the properties and business of the corporation; the fair value of the properties that belonged to said defendant corporation and of which the receiver appointed by this court is directed to take possession is in excess of $2,000,000.

The taking over of the said properties by the receiver and their operation for an indefinite period of time for the purposes stated

in the said order will occasion a loss in value of the said properties in excess of the sum of $300,000.

San Juan, P. R. July 30, 1940.

JOSE GONZALEZ HERNANDEZ.

Subscribed and sworn to before me in the city of San Juan, Puerto Rico, this thirtieth day of July, 1940, by Mr. Jose Gonzalez Hernandez, of age, property-owner, resident of San Juan, to me personally known.

B. MARRERO RIOS,
Assistant Clerk, Supreme Court of Puerto Rico.

[Same title.]

ORDER.

San Juan, Puerto Rico, July 31, 1940.

The exception taken by Rubert Hermanos, Inc., et als. to the resolution and order of this court of July 26, 1940, with regard to the appointment of a receiver, is hereby allowed. Let the document filed to that end be added to the record of this case.

It was so decreed as witness the signature of the Honorable Martin Travieso, Associate Justice in vacation.

MARTIN TRAVIESO,
Associate Justice in vacation.

Attest: JOAQUIN LOPEZ, *Secretary-Reporter.*

[Title omitted.]

ADDITIONAL ASSIGNMENT OF ERRORS.

[Filed August 5, 1940.]

Now come Rubert Hermanos, Inc., defendant in the above-entitled cause, and Manuel Gonzalez Martinez, Rafael Martinez Dominguez, Jose Gonzalez Hernandez, Aureo Garcia and Gabriel Soler, trustees in liquidation of said defendant corporation Rubert Hermanos, Inc., by their undersigned attorneys, and respectfully file

herewith the following additional assignments of error in connection with their petition for appeal filed herewith on or about the 30th of July, 1940 and pending allowance:

24. The court erred in holding that all acts realized by the defendant corporation or its trustees in liquidation after the judgment of July 30, 1938 are null and void.

25. The court erred in holding that the defendant corporation was without power or right to do whatever was necessary to comply with the order addressed and directed to the said defendant in the final judgment and that such order requiring immediate dissolution and liquidation could only be carried out and complied with by a receiver appointed by the court.

San Juan, P. R., July, 30, 1940.

HENRI BROWN,
J. SIERE JR.,
Attorneys for Appellant.

[MEMORANDUM: Petition for appeal, filed July 30, 1940; order allowing appeal, August 9, 1940; citation, dated August 10, 1940, returnable in sixty days; bond in the sum of $30,300, Manuel González Martinez, et al., Trustees, as surety; and order approving bond, August 29, 1940, are here omitted. A. I. CHARRON, *Clerk*.]

[Title omitted.]

STIPULATION AS TO RECORD ON APPEAL.

Received September 24, 1940.

Now come the parties hereto and stipulate that the transcript of the record on appeal shall consist of the following documents, which shall be printed, to wit:

1936

1. Feb. 28, Amended information filed by The People of Puerto Rico.

1937

2. Aug. 19, Defendant's answer to the amended information.

1938

3. July 30, Judgment of the Supreme Court of Puerto Rico.
4. July 30, Motion by The People of Puerto Rico praying for the appointment of a receiver.
5. Nov. 9, Order regarding the above motion.

1940

6. Mar. 28, Written statement by defendant depositing with the clerk of the Supreme Court of Puerto Rico $6,000 to cover fine, attorneys' fees and costs.
7. Mar. 30, Order of the Supreme Court of Puerto Rico with reference to the above.
8. May 13, Motion by The People of Puerto Rico asking that the motion for the appointment of a receiver be set for hearing.
9. May 23, Order of the Supreme Court of Puerto Rico regarding payment of the fine, attorneys' fees and costs.
10. June 4, Order setting for hearing the motion for the appointment of a receiver.
11. June 24, Answer and opposition to the motion praying for the appointment of a receiver.
12. June 24, Journal entry.
13. July 5, July 15, July 16, Complete original and reply briefs filed by the parties with reference to the motion regarding the appointment of a receiver.
14. July 26, Opinion of the Supreme Court of Puerto Rico regarding motion for the appointment of a receiver.
15. July 26, Order of the Supreme Court of Puerto Rico appointing receiver.
16. July 30, Exception noted to the above order.
17. July 30, Petition for appeal.
18. July 30, Assignment of errors.
19. July 30, Affidavit of Jose Gonzalez Hernandez.
20. July 31, Order of the Supreme Court of Puerto Rico regarding the exception taken to the order appointing receiver.

21. Aug. 5, Additional assignment of errors.
22. Aug. 9, Order allowing appeal and fixing amount of supersedeas and cost bond.
23. Reference to citation and service of same.
24. Aug. 19, Appeal bond.
25. Aug. 29, Order approving bond.
26. This stipulation.
27. Sept. Translator's certificate.
28. Sept. Certificate of secretary-reporter of the Supreme Court of Puerto Rico as to the correctness of the record.

San Juan, Puerto Rico, September 21, 1940.

HENRI BROWN,
by J. S. Jr.,
J. SIFRE, Jr.,
Attorneys for Appellant.

GEORGE A. MALCOLM,
MIGUEL GUERRA-MONDRAGON,
Attorneys for Appellee.

[Title omitted.]

TRANSLATOR'S CERTIFICATE.

I, B. Marrero Rios, official interpreter and translator of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful translation of their respective originals as the same appear from the original record of this case on file in this office.

In testimony whereof, I have signed this certificate in the City of San Juan, Puerto Rico, this eighteenth day of September, 1940.

B. MARRERO RIOS,
Official Interpreter and Translator of the Supreme Court of Puerto Rico.

[Title omitted.]

CLERK'S CERTIFICATE.

I, B. Marrero Rios, acting secretary-reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above-entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office and embodied in this transcript by the appellant, according to the order of the court.

I further certify that the translation of said papers and proceedings has been revised by me as official translator of this court, as shown by my certificate attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, in the City of San Juan, Puerto Rico, this twenty-seventh day of September, 1940.

B. MARRERO RIOS,
Acting Secretary-Reporter of the Supreme Court of Puerto Rico.

[$126.50 Internal Revenue stamps cancelled.]

[fol. 141] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On October 24, 1940, the following Statement on Appeal was filed by appellants:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

RUBERT HERMANOS, INC., Defendant-Appellant,

v.

THE PEOPLE OF PUERTO RICO, Plaintiff-Appellee

STATEMENT ON APPEAL

This appeal comes to this Court by permission of the Supreme Court of Puerto Rico duly granted on the 9th day of August, 1940 (Typewritten Record on Appeal, p. 222).

The defendants appeal from an order or decree entered in the above entitled proceeding in July 26, 1940 which order or decree

appointed a Receiver of all the properties formerly owned by defendant;

purported to vest title in the Receiver to all of defendant's property both real and personal;

directed the Receiver to take possession of all of defendant's property whether in possession of defendant or its transferees;

directed the defendant corporation and its directors, officers, stockholders, agents, employees, trustees, liquidators, assignees, lessees, to deliver and turn over to the Receiver all properties of the defendant corporation in their possession or under their control;

authorized and directed the Receiver to continue the business and to operate the business to which the properties of the defendant were devoted;

authorized the Receiver, to transfer title to the defendant's properties at such time as the People of Puerto Rico should elect to either confiscate or sell at public sale;

[fol. 142] and authorized the Receiver to create liens against defendant's properties by obtaining loans against said properties.

First. The appellant contends there are substantial Federal questions involved on this appeal.

Second. It is contended that this court has jurisdiction because the appeal is taken from a final decision in a civil case wherein the value in controversy exceeds $5,000.00.

Third. That the interpretation by the Supreme Court of Puerto Rico of the local laws involved is patently wrong and clearly erroneous.

(a)

The Statutory Provision Which Sustains the Jurisdiction of This Court to Review by Appeal the Decree or Order of the Supreme Court of Puerto Rico

The statutory provision vesting jurisdiction in this Court is found in Title 28, Judicial Code, Section 225 which provides in part as follows:

"(a) Review of Final Decisions.—The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

. . . . . .

Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000—and in all habeas corpus proceedings."

The order or decree appointing a Receiver in this action is a final decision. In Farmers Loan and Trust Co., 129 U. S. 206 it was decided that an order of the Circuit Court, entered after a final decree, authorizing a Receiver to bor- [fol. 143] row money was a final decision from which an appeal could be taken to the Supreme Court. In Texas Co. v. International G. N. Ry. Co., 237 Fed. 921, it was held that an order authorizing a Receiver to issue certificates to secure loans entered after a final judgment was an appealable order.

The order or decree appealed from here appoints a Receiver, vests title to property in him, and authorizes him to convey title and to create liens by borrowing money against the said properties.

City of Eau Claire v. Payson, 107 Fed. 552, 557:

"The Supreme Court has not placed upon the words 'final decree', respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction."

Brush Electric Co. v. Electric Imp. Co., 51 Fed. 557:

"A new question arising in the trial court in proceedings subsequent to the mandate of an appellate court and not included therein may be the subject of another appeal."

Gay v. Hudson River Elec. Power Co., 184 Fed. 689, 690;
Odell v. Batterman, 223 Fed. 292;
Amer. Brake Shoe & Foundry Co. v. N. Y. Rys. Co., 282 Fed. 523;
Laidlaw v. Oregon Ry. & Nav., 81 Fed. 876;
Lyons v. Empire Fuel, 270 U. S. 930;
Clark v. Willard, 292 U. S. 112.

1

Substantial Federal Questions Involved on This Appeal

It is contended by the appellants that the penalties and forfeiture of land created by Act No. 47 convert the Act into an Ex Post Facto Law in violation of Section 2 of the Organic Act of Puerto Rico.

[fol. 144] Appellant at all stages of this case, has contended that the penalty provisions of Act No. 47 (annulment of contracts, cancellation of entries in public registeries, confiscation or forced sale at auction of real [immovable] property) are ex post-facto laws and therefore violative of the Organic Act prohibitive of legislation of this character. The trial court (the Supreme Court of Puerto Rico) as well as this Court, on appeal from the judgment and the Supreme Court of the United States have, in reviewing the judgment of this Court on certiorari, all found it unnecessary to pass upon this contention because none of these penalties has either been prayed for in the amended information or decreed by the trial court in the final judgment.

For the first time this question is before this Court for consideration on appeal.

The defendant corporation was organized in 1927 and prior to 1935 had acquired title to more than 500 acres of land in violation of the Joint Resolution of Congress of

May 1, 1900. The Joint Resolution provided no penalties in the event of its violation. Thirty-five years passed prior to the enactment of any penalties. In 1935 Act No. 47 of the Local Legislature was enacted amending Section 6 of the Quo Warranto Act so as to read as follows:

"Whenever in the opinion of the Court it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof, the judgment entered shall decree the dissolution of the defendant entity if it be a domestic corporation, the prohibition to continue doing business in the country if a foreign corporation, the nullity of acts done and contracts made by the defendant corporation or entity, and in addition, the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico shall be decreed; and when a decree of nullity affects real property and the People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the rea- [fol. 145] sonable price to be paid for said property. For these purposes the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings. * * *"

The 1935 Act thus clearly

1—provides for the loss of the corporate franchise and dissolution of the corporation;

2—forfeiture of real property;

3—nullification and impairment of existing contracts.

In a quo warranto proceeding a judgment was entered on July 30, 1938 in the Supreme Court of Puerto Rico which adjudged and decreed that the defendant corporation was engaged in agriculture and was guilty of owning and controlling 12,188 acres of land in violation of the provisions of a Joint resolution of the Congress of the United States, of Section 39 of the Organic Law of Puerto Rico and of its own articles of incorporation by all of which provisions the defendant corporation was expressly limited and restricted to the ownership and control of lands not in excess of 500 acres, and the court further decreed:

"the forfeiture and cancellation of the license of the defendant corporation and of its articles of incorporation is

hereby ordered and decreed as well as the immediate dissolution and winding up of the affairs of said corporation."

The judgment also imposed costs and a fine of $3,000.00.

An appeal was taken to the Circuit Court of Appeals for the First Circuit and a supersedeas obtained. The Circuit Court of Appeals by a divided Court reversed the judgment (106 Fed. (2d) 754). Certiorari was granted by the United States Supreme Court which overruled the Circuit Court of Appeals and affirmed the judgment of the Supreme Court of Puerto Rico (84 U. S. Law Ed. 615). In delivering the opinion of the Supreme Court Mr. Justice Frankfurter stated:

[fol. 146] "The question here in controversy is a matter of great importance to Puerto Rico and involves the power of its legislature to enforce Congressional policies affecting the Island. We therefore brought the case here on a writ of certiorari, 309 U. S. ——, ante, 416, 60 S. Ct. 467, to review a decision of the Circuit Court of Appeals for the First Circuit, 106 F. (2d) 754. That court had reversed the judgment of the Supreme Court of Puerto Rico, 53 P. R. R. 779 (Spanish edition), sustaining a proceeding in quo warranto brought against respondent."

On the aforesaid appeal there was merely decided the validity of the forfeiture of a corporate Charter. On this appeal there is involved the question of forfeiture of lands. On the prior appeal the Supreme Court finally decided that the insular Courts were validly invested with jurisdiction to enforce the Congressional policy that corporations may not own more than 500 acres of land. The United States Supreme Court decided:

"'On the only questions now before us, we think the Supreme Court of Puerto Rico acted within the scope of power validly conferred upon it by the Legislative Assembly."

The People of Puerto Rico on the prior appeal expressly represented to the Court that no forfeiture of land was involved. We quote from page 60 of the brief filed by the People of Puerto Rico in support of the petition filed in the Supreme Court of the United States for a writ of certiorari to the Circuit Court of Appeals, First Circuit.

"As heretofore pointed out (*ante*, p. 14; and footnotes 3, 11, 12, pp. 10, 51, 52) *no forfeiture of land is involved in*

this case. No such forfeiture was asked in the complaint (Prayer, R. 4-5; 46-47); and none was adjudged by the insular Supreme Court, nor even hinted at in its findings (R. 304, 305). And yet this idea, that the insular government cannot be permitted to *"forfeit land"* in this proceed-[fol. 147] ing, runs all through the opinion of the majority judges of the Circuit Court; and manifestly influences their conclusions. It reflects a wholly mistaken impression of the character of the case. No question of land forfeiture is involved, in any way."

In the brief for the People of Puerto Rico filed in the Supreme Court of the United States, the People again urged that no land forfeiture was involved and it is stated at page 10 of that brief:

"that the majority judges of the Circuit Court of Appeals were perhaps led into error by failing to notice that no land forfeiture is involved in this case at all; that none was asked in the complaint, and none adjudged by the insular court; and that there is here a case of present continuing violations,—not simply of 'past violations'."

We quote from the printed copy of the oral argument before the Supreme Court (Typewritten Record, p. 160):

"The Chief Justice: Was there any provision with respect to the disposition of property that had been acquired by the corporation?

Mr. Rigby: There is a provision that if the Island Government has so chosen, there shall be a forfeiture of the property and a cancellation of all the entries in the records.

The Chief Justice: You mean forfeiture to the Government?

Mr. Rigby: To the Government; that has not been asked in this case. Our opponents call attention to that and say the existence of that provision for the penalty makes this an *ex post facto* law, because these penalties were imposed after the organization of this corporation.

Our answer to that is two-fold; in the first place, as I have said, that that has not been asked in this case nor adjudged by the Supreme Court of Puerto Rico; that if later on an attempt should be made to enforce the penalties, [fol. 148] proper allegations would have to be made and the company would have its day in court upon them.

Mr. Justice Frankfurter: What is the prayer of the bill?

Mr. Rigby: The prayer of the bill is simply for the dissolution—it is at the bottom of page 4, running onto page 5 of the complaint:

'Therefore, The People of Puerto Rico, through its aforesaid attorney general, prays this Honorable Court to adjudge the said domestic corporation to have forfeited its franchise, to order its immediate dissolution, to prohibit it to do business in Puerto Rico and to impose on the same the proper fine, with all other pronouncements which in equity and justice are pertinent in the premises.'

Of course, the last is the usual prayer for general relief.

The Chief Justice: What was the judgment?

Mr. Rigby: The judgment was for the dissolution of the corporation" (p. 6).

Pages 8 and 9:

"Mr. Justice Stone: How is their choice evidenced, by a suit?

Mr. Rigby: I presume it would have to be by a suit, by some formal action of some kind. Nothing of that kind is here so far as the facts in this case are concerned. The prayer is only, as I read, in the usual form, under quo warranto procedure for forfeiture of charter, license to do business, dissolution of the corporation, fine and costs—and that is all that has been ordered. So, normally, what would follow that in effect would be a requirement of dissolution by the stockholders in the manner pointed out by the corporation law, and if necessary, the appointment of a receiver and the winding up of the business of the corporation, as the business of any corporation is wound up upon death of the corporation, for any purpose at all or for any reason.

[fol. 149] The Chief Justice: Is there any time within which the Government of Puerto Rico may conclude to make its choice after the judgment?

Mr. Rigby: If it did, it would have, as I said before, as we understand it, to file a supplemental bill or some new action in court, or begin a new action and proceed and give the respondents their day in court, because there is nothing in this case to authorize a summary proceeding, upon the face of this judgment. There is nothing of that kind in this judgment at all."

It is clear therefore that land forfeiture was not involved on the prior appeal and it is equally clear that land forfeiture is involved on the present appeal. The Receiver is vested by the terms of the order appointing him with all of the real estate formerly owned by the defendant corporation.

The appellant also contends that the order appealed from deprives persons of property without due process of law. The property owned by the corporation at the time of the commencement of the Quo Warranto proceeding had been transferred to a civil partnership prior to the entry of the order appointing the Receiver. The persons constituting the civil partnership were not a party to this proceeding and were in possession of the property under claim of title. Without notice to such persons, without a hearing or an opportunity to be heard the Court has ordered the Receiver to take possession of such property.

The properties confiscated and turned over to the Receiver were acquired prior to 1935. It is clear that the law as thus invoked and applied is an Ex Post Facto Law. It imposes forfeitures and penalties with respect to titles acquired prior to the enactment of the law.

[fol. 150] 2

The stage in the proceedings in the Supreme Court of Puerto Rico (also the Court of first instance) at which the Federal questions sought to be reviewed were raised.

In the Quo Warrants' proceeding the defendant filed a Demurrer contending among other things that the Court below was without jurisdiction because — was brought under Act 47 which is void as it authorizes the confiscation and deprivation of property without due process of law and that said Act No. 47 is an ex post facto law (Prior Appeal, p. 57). The same questions were raised on the motion to dismiss made at the close of the plaintiff's case (Prior Appeal, p. 127). On the application for the appointment of a Receiver the appellant raised these same objections and others (Typewritten Record, pp. 35, 36).

The amount or value in controversy is in excess of $5,000

The value of appellant's properties involved in the forfeitures imposed in these proceedings is in excess of $2,000,000 (Typewritten Record, p. 219).

(b)

The judgment appealed from on the question of the Local Law alone (apart from the Federal questions involved) is "inescapably wrong" or "patently erroneous".

The adjudication of a forfeiture of lands in a Quo Warranto suit is a violation of law that is "inescapably wrong" or "patently erroneous."

The complaint sought the forfeiture of the franchise and not the forfeiture of land (Record, p. 1).

The final judgment adjudicated the forfeiture of the franchise and did not adjudge the forfeiture of land (Record, p. 24).

[fol. 151] The order appealed from does work a forfeiture of the land (Record, p. 202).

The law is well settled that a forfeiture of a corporate franchise does not justify a forfeiture of lands or goods.

"When we examine the first of these grounds, we find nothing in the books to support an idea that the abuse of a corporate franchise occasions a forfeiture of land or goods, rights or credits, or in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted, was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit their franchises * * *.

Consequently the judgment could not direct a seizure of corporate possessions, as a forfeiture for the violation of the charter."

State Bank v. State, 1 Blackford (Ind.), 267, 281, 12 Am. Decisions, 234, 235.

The decisions of the Supreme Court of California are commonly followed in Puerto Rico because many of its codes and statutes derive from the laws of that state.

In Havemeyer v. Superior Court, 84 Cal. 327, 379, the Supreme Court of California said:

"What is forfeited to the state, and all that is forfeited, is the character,—the right to be a corporation; and this is presumed solely upon the ground that the condition upon which it was granted has been violated. * * *. If this condition is broken, the charter which the state has given is taken back by the state; but the property which the corpora-

tion has acquired with its own means goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property."

In People v. O'Brien the New York Court of Appeals stated in 111 N. Y. 1 at page 37:

[fol. 152] "Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations, but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction, which would follow a judicial determination, that the property invested in corporate securities, was beyond the pale of the protection afforded by the fundamental law.

It is not perhaps strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts that dicta, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation."

The order or decree appealed from is clearly erroneous because the final judgment contained no provisions with respect to either a receivership or confiscation or alienation of property. The statute Act 47, above quoted expressly provides that in cases of alienation or confiscation

"the final judgment shall fix the reasonable price to be paid for said property * * *."

The final judgment here is the judgment that was affirmed by the United States Supreme Court and is a judgment from which no appeal may be taken and is thus final in a complete [fol. 153] sense. That judgment is utterly devoid of any

reference to a receivership or confiscation of property or fixing of price for property to be confiscated or sold.

The Supreme Court of Puerto Rico erred in its interpretation of the local laws involved.

1st. Act 47 was interpreted as giving to the People an option to confiscate appellant's property or to have it sold at public auction. The Court below ruled (a) that the option might be exercised anytime within six months of the final judgment instead of ruling that the sale, if any, must take place within the said six months period, and (b) refused to rule that the statute requires the final judgment to state provisions with respect to value or price of sale. The interpretation runs counter to the plain words of the statute and counter to the clear mandate of the law and violates well settled rules of construction. That part of the statute providing for the option to confiscate or have sold at auction reads as follows:

"When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, the People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf a confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered."

"In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain."

We contend, with respect to the sale at public auction that there can be only one reasonable construction. The auction sale must take place within six months from the date of the final judgment. The phrase in the statute "within a term not greater than six months" limits and is [fol. 154] applicable to the phrase "the sale at public auction". Grammatically and in accordance with the settled rule of construction (last antecedent rule) the words "within a period not greater than six months." apply to and qualify the words "sale at public auction" that immediately precede. The words do not apply or qualify the word "option".

Puget Sound Electric Ry. v. Benson, 253 Fed. 710;
State ex rel. Stewart v. District Ct., 65 Pac. (2nd) 141;

Hopkins v. Andersen, 21 Pac. (2) 560;
Board of Port Comm's. v. Williams, 60 Pac. (2) 454;
Taylor v. Prudential Ins. Co., 253 N. Y. S. 55.

(b) Another patent error lies in the interpretation of Act No. 47 by the Supreme Court of Puerto Rico. That Court gives no effect to the words contained in Section 2 of the Law:

"the final judgment shall fix the reasonable price to be paid for said property * * *"

The statute in unmistakable language requires that the final judgment must fix the value or price in the event of either confiscation or sale. Section 6 of the Quo Warranto Law reads as follows:

"Whenever in the opinion of the Court it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof, the judgment entered shall decree the dissolution of the defendant entity if it be a domestic corporation, the prohibition to continue doing business in the country if a foreign corporation, the nullity of acts done and contracts made by the defendant corporation or entity, and in addition, the cancellation of [fol. 155] every entry or registration made by the said corporations in the public registries of Puerto Rico shall be decreed; and when a decree of nullity affects real property and the People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings. * * *"

The final judgment in this proceeding contained no reference to a receiver and contained no provisions with respect to confiscation or sale and no provisions as to prices or value of the property. The statute must be construed to mean that the judgment shall contain, what the statute says, a provision fixing the reasonable price. There is no alternative. It is plainly error to rule that the statute permits confiscation or sale pursuant to a judgment that contains no provisions fixing the price.

2. The Supreme Court of Puerto Rico erred in its construction of Section 182 of the Code of Civil Procedure. That section sets forth the statutory jurisdiction for the appointment of a Receiver. It reads as follows:

"A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or jointly interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. After judgment, to carry the judgment into effect.

[fol. 156] 3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

5. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

(a) We note first that jurisdiction to appoint a Receiver is confined to actions that are pending or that have passed to judgment. Here no action was pending at the time of the appointment of the Receiver. The action had terminated in a final judgment that had been appealed to the United States Supreme Court.

Section 348 of the Code of Civil Procedure defines the meaning of pending action:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time to appeal has expired, unless the judgment is sooner satisfied."

The Supreme Court of Puerto Rico in Morales v. Cruz Velez, 36 P. R. R. 216, referring to Section 91 and 348 of Civil Code of Procedure said:

"Construing the two articles together we feel bound to hold that an action is still pending until an unappealable judgment arises."

The judgment of affirmance by the Supreme Court of the United States is an unappealable judgment. The case is therefore not a pending case, it was terminated. Therefore a Receiver cannot lawfully be appointed on the ground that an action is pending. There is one other ground to [fol. 157] consider. Is this a case where a Receiver may be appointed in an action that has passed to judgment? The statute we contend does not authorize the appointment of a Receiver in this case. This statute was taken in almost the same language from a similar California Statute. The local legislature in adopting the California statute intended it to have the intent and meaning it had in the original state as interpreted by the Courts of that State. Only in two cases of those provided for in Section 182 of the Code of Civil Procedure can a receiver be appointed after judgment, to wit, in the two cases expressly mentioned in the statute and these are the ones comprised in subdivisions 2 and 3 of said article. Section 564 of the Code of Civil Procedure of California, which the Supreme Court of Puerto Rico has stated in almost a literal copy of Section 182 of the Code of Civil Procedure, provides as follows:

Sec. 564. Appointment of Receivers. A receiver may be appointed by the Court in which an action is pending, or by the judge thereof.

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appeared that the mortgaged property is in danger of being

lost, removed, or materially injured, or that the conditions of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

[fol. 158] 4. After judgment, to dispose of an appeal, or in proceedings in aid or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied; or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction;

7. In all other cases where receivers have heretofore been appointed by the usages of courts in equity.

It is well settled in California that in accordance with the provisions of Section 564 of the Code of Civil Procedure of said State there are only two provisions which authorize the appointment of a Receiver after judgment, to wit, those contained in subdivision 3 and 4 of said section which are identical to subdivisions 2 and 3 of Section 182 of our code:

There are but two statutory provisions authorizing the appointment of a receiver after judgment. Subdivisions 3 and 4 of Section 564 of the Code of Civil Procedure.

22 Cal. Juris., sec. 33, page 451.

And it is to these two subdivisions, and to them alone, that paragraph 1 of Section 182 refers when it provides that a receiver may be appointed in an action which has passed to judgment.

The first paragraph of Section 564 of the Code of Civil procedure of California refers to an action which is pending but not to an action which has passed to judgment, whereas the first paragraph of Section 182 of our code mentions both [fol. 159] cases. This, it is submitted, makes all the more clear our contention that only subdivisions 2 and 3, which expressly so provide, authorize the appointment of a receiver after judgment. The legislature of Puerto Rico in-

cluded the words "or has passed to judgment" to harmonize the first paragraph of Section 182 with the subsequent provisions of said section. In other words, it is evident that the words of the first paragraph with regard to pending actions refer to subdivisions 1, 4 and 5, and the words "or has passed to judgment" refer to subdivisions 2 and 3 which expressly provide for the appointment of a receiver after judgment.

Leaving aside the fact that the petitioner's motion is based expressly on subdivisions 4 and 5, it is obvious that subdivisions 2 and 3 would be and are inapplicable. The doctrine in California is that subdivision 3 of Section 564 of the Code of Civil Procedure of said State which authorizes the appointment of a receiver "after judgment, to carry the judgment into effect" applies only when the judgment affects specific property.

"A receiver may be appointed 'after judgment, to carry the judgment into effect', unless the execution thereof has been stayed by proper bond. This code provision applies only where the judgment affects specific property."

22 Cal. Jris., sec. 34, page 452.
White v. White, 130 Cal. 528.

With regard to subdivision 3 it is obvious that the same can not be invoked for the purpose of the appointment of a receiver in this case inasmuch as there is no property to dispose of in accordance with the judgment in view of the fact that the judgment makes no provision whatever with regard to defendant's properties. Nor is there any need of preserving property during the pendency of an appeal. Nor is this a case involving proceedings in aid of execution when an execution has been rendered unsatisfied.

[fol. 160] 3. The Supreme Court of Puerto Rico erred in its interpretation of Section 28 of the corporation law which by its plain language and under well settled decisions places the dissolution "in any manner" of a corporation in the hands of its directors.

The statute follows:

"Section 28.—*Directors as Trustees Pending Dissolution.* Upon the dissolution in any manner of a corporation, the directors shall be the trustees thereof pending the liquidation, with full power to settle the affairs, collect the out-

standing debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, so far as such moneys and property shall suffice. They shall have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority of the said trustees, to prescribe the terms and conditions of the sale of such property, or may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of the said property. In case of a vacancy or vacancies in the board of directors of such corporation existing at the time of dissolution or occurring subsequently thereto, the surviving directors or director shall be the trustees or trustee thereof, as the case may be, with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them, and to do and perform all such other acts as shall be necessary to carry out the provisions of this Act relative to the winding up of the affairs of such corporation and to the distribution of its assets."

"Section 29.—*Powers and Liabilities of Trustees in Liquidation.*—The directors constituted trustees as aforesaid shall have power to sue for and recover the aforesaid debts and property by the name of the corporation and shall be suable by the same name, or in their own names or individual capacities for the debts owing by such corporation, [fol. 161] and shall be jointly and severally responsible for such debts to the amount of the money and property of the corporation which shall come to their hands or possession as such trustees."

"Section 31.—*Distribution of Assets by Trustees or Liquidators.*—The said trustees or liquidators shall pay ratably, so far as its assets shall enable them, all the creditors for the corporation who prove their debts in the manner directed by the court or by the law of civil procedure. If any balance remain after the payment of such debts and necessary expense, the same shall be distributed among the stockholders."

"Section 32.—*Pending Suits not Affected by Dissolution.* Any suit now pending or hereafter to be begun against any

corporation which may become dissolved before final judgment, shall not lapse by reason of such dissolution; but no judgment shall be entered in any such action except upon notice to the trustees or liquidators of the corporation."

Identical or similar statutory provisions have been interpreted and applied repeatedly by the courts. The right of the directors, in their character of liquidators, to appear in suits affecting the corporation, whether as plaintiffs or as defendants, under statutes of this nature, is well established.

"In many states statutes have been enacted designating the directors of a dissolved corporation as its trustees or providing for the judicial appointment of trustees for the dissolved corporation. Such statutes do not impair the obligation of the contracts of creditors."

"The preponderance of authority in respect of such statutes is in favor of the doctrine that the general term 'dissolution' is applicable to dissolution produced by the forfeiture of corporate charters; but in some jurisdictions the position has been taken that only voluntary dissolutions are within the purview of the statutes in which this term is used without qualification."

13 Am. Jur., page 1202.

[fol. 162] "In some states it has been laid down that trustees of dissolved corporations are empowered to sue in the name of the defunct corporations.

In most jurisdictions, however, the clauses by which their procedural capacity is defined have been construed as importing simply that in any action involving the claims or liabilities of a defunct corporation, the trustees are ordinarily the proper parties, plaintiff or defendant."

13 Am. Jur., pages 1204-1205.

"Generally, the trustees of a defunct corporation as such may sue and, conversely, suit may also be brought against them. In addition to their powers of maintaining and defending actions pending at the time of the dissolution, trustees have power to confess judgment on indebtedness which the corporation cannot pay."

19 C. J. S., pages 1518-1519;
General Ry. Signal Co. v. Cade, et al., 106 N. Y. S. 729.

Puerto Rico adopted its Corporation Law from the New Jersey Corporation Law. The Court of Errors and Appeals of New Jersey in Grey Att. Gen. v. Newark Plankroad Co., 65 N. J. L. 603, a Quo Warranto proceeding, held that a judgment dissolving a corporation terminated the corporate existence except that it continued as a body corporate for the purpose of winding up its affairs, disposing of and conveying its property and dividing its capital.

Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257.

Here there has been no hearing on the issue of just compensation. There is merely a notice of motion for the appointment of a receiver with a provision in that order for an ex parte application by the receiver for an order per- [fol. 163] mitting the sale at public auction of all of the property formerly owned by the appellant with no hearing as to the terms of sale or price or compensation.

The Court Below was Without Jurisdiction to Appoint a Receiver

In the quo warranto proceeding there were no allegations in the complaint upon which an application could be based for the appointment of a Receiver. The quo warranto suit was concluded and finally determined and ended upon the entry of the final judgment. In compliance with the final judgment in the quo warranto suit the assets of the corporation with the unanimous consent of its stockholders had been transferred by the Liquidating Trustees to a civil partnership and all the debts had been paid (Record, pp. 35, 64).

The Court was without jurisdiction to appoint a Receiver after judgment because at the time the Receiver was appointed the judgment had already been carried into effect. The purpose of the quo warranto suit as we have heretofore established was to effectuate the forfeiture of the corporate charter. The Charter was forfeited, the costs imposed were paid and the fine paid. That constituted a satisfaction of the judgment in the quo warranto suit. If there was or if there is any power in the Courts of Puerto Rico to appoint a Receiver of the assets of the dissolved corporation it is clear that there is a necessity for an action or a proceeding to be instituted to accomplish that result. However, here the order was entered after the final judgment on a mere notice of motion. No necessity was shown for the appoint-

ment of a Receiver. Nevertheless the Receiver has been vested with title to all of the assets formerly owned by the corporation but which had been, prior to the Receiver's ap- [fol. 164] pointment, transferred to persons to whom those assets might rightfully be transferred pursuant to the provisions of the Corporation Act of Puerto Rico.

We have said that the Puerto Rico statute was taken literally from the California statute. The Supreme Court of California held in Havemeyer v. Superior Court, 84 Cal. 327:

"The conclusion which inevitably follows from these views is, that, in an action under sections 802, et seq. of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commended by a creditor or stockholder of the corporation. (Code Civ. Proc., sec. 565.)"

The appointment of a Receiver in this case involves consequences that are drastic. The corporation had contracts of long standing transacting business with hundreds of individual land owners. These land owners under contracts delivered all the cane sugar produced on the lands owned by these individuals to the corporation. These contracts and the fruits of them under the order appealed from would be in the possession of the Receiver. All of these assets had been, as we assert, properly transferred by the Liquidating Trustees to a civil partnership. All of these property rights, without any trial, without any hearing, have been stripped from the persons in possession of them and turned over to the Receiver under the terms of the order appealed from.

Respectfully submitted, Henri Brown, J. Sifre, Jr.,
Attorneys for Appellant.

Thereafter, to wit, on November 5, 1940, the following Motion of Appellee to Dismiss for want of jurisdiction was filed:

IN THE

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT

OCTOBER TERM, 1940

No. 3631

RUBERT HERMANOS, INC.,
Defendant, Appellant,

vs.

THE PEOPLE OF PUERTO RICO,
Plaintiff, Appellee.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO,
FROM ORDER APPOINTING RECEIVER, JULY 26, 1940.

MOTION OF APPELLEE TO DISMISS APPEAL FOR WANT OF JURISDICTION

Now comes The People of Puerto Rico, plaintiff-appellee, and moves to dismiss this appeal of the defendant-appellant, Rubert Hermanos, Inc., for want of jurisdiction; and in support of this motion appellee respectfully shows:

1. This is appeal by the defendant, Rubert Hermanos, Inc., is from an order of the Supreme Court of Puerto Rico, in an original *quo warranto* proceeding pending in that court, appointing a Receiver for the defendant's property, for the purpose only of taking possession and managing it, pending the determination of the court with reference to its disposition, and to preserve the *status quo* during the litigation (R. 127-132).

2. Such an order is not a final judgment or decree, but is simply an interlocutory order; and hence,

3. It is not appealable to this court, because it is not a

"final decision" [Judicial Code, Sec. 128(a), "Second", as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936]:

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION

Plaintiff-appellant, Rubert Hermanos, Inc., claiming still to be a domestic corporation of Puerto Rico, appeals from an order of the insular Supreme Court, July 26, 1940, appointing a Receiver to take possession of, manage, and conserve its property, pending the litigation (R. 127-139). The order contains no decision or direction concerning the ultimate disposition of the property.

The order was entered in an original *quo warranto* proceeding in the insular Supreme Court of Puerto Rico, begun February 26, 1937.[1]

This case has already been before this Court and the Supreme Court of the United States [*Rubert Hermanos, Inc.* vs. *People of Puerto Rico*, 106 F. (2d) 754 (No. 3417 in this court); *Puerto Rico* vs. *Rubert Hermanos, Inc.*, 309 U. S. 543]. The judgment of the insular Supreme Court,

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[1] "Amended Complaint", R. 1-4; "Answer of Defendant, Rubert Hermanos, Inc.", R. 5-14; "Judgment", July 30, 1938 (R. 15-16) finding defendant guilty of holding more than 500 acres of land (12,188 acres) in violation of the Act of Congress and of its own articles of incorporation adopted pursuant to that Act and to the local statutes of Puerto Rico, and cancelling its license to be a corporation and its articles of incorporation, and decreeing its immediate dissolution and the winding up of its affairs, and directing it to pay the costs of the proceeding, including $2,000 attorney's fees, and a fine of $3,000; Motion of defendant, the People of Puerto Rico, July 30, 1938, for the appointment of a Receiver (R. 16-17); and Order of the insular Supreme Court, November 9, 1938 (R. 17), directing that the motion for the appointment of a Receiver "be left in abeyance" (during the pendancy of the former appeal to this Court from the original judgment of July 30, 1938).

July 30, 1938, cancelling the license of the company to be a corporation and ordering its dissolution and the winding up of its affairs, was ultimately affirmed by the United States Supreme Court on March 25, 1940 (309 U. S., *supra*, 543, 550). The mandate from that court was filed in the insular Supreme Court on May 13, 1940; and on the same date the insular Attorney General on behalf of the People of Puerto Rico renewed (R. 18-19) the motion for the appointment of a Receiver, which had been held in abeyance since November 9, 1938 (R. 17, *supra*), while the case was pending in this Court and the United States Supreme Court.[2] The motion was set for hearing;[3] the plaintiff company filed its "Answer and Opposition" (R. 21); arguments were heard, June 24, 1940 (R. 23); and elaborate briefs and reply briefs filed on behalf of both parties (R. 23-120). On July 26, 1940, the insular Supreme Court handed down its opinion (R. 120-127); and on the same date entered its order appointing the Receiver (R. 127-139, *supra*). The company excepted (R. 130-131), and brought this appeal.

THE APPELLANT COMPANY'S CONTENTION

It appears from the briefs on behalf of the appellant company ("*Brief in Support of 'Answer and Opposition'*", "IV", R. 56-57, and exhibits appended to its "*Reply Brief in Opposition*" (R. 118-119), and from the findings in the Court's opinion of July 26, 1940 (at p. 121), that immediately after the affirmance of the original judgment by the

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[2] On March 28, 1940, only three days after the decision of the United States Supreme Court, the appellant company, Rubert Hermanos, Inc., paid to the clerk of the insular Supreme Court $6,000 to cover the fine and the attorneys' fees and the costs adjudged against it by the original judgment of July 30, 1938 (R. 17-18); and, ten days after the renewal of the People's motion for the appointment of a Receiver, that court directed the distribution for those purposes (R. 20) of the money thus paid.

[3] Order, June 4, 1940; R. 21.

United States Supreme Court by its decision of March 25, 1940, the stockholders themselves proceeded to dissolve the appellant corporation and to transfer its property to a newly organized partnership (*sociedad*) composed of its own stockholders, and that accordingly it is now contended by counsel appearing here in the name of the appellant that the original judgment of dissolution of the insular Supreme Court of July 30, 1938 (R. 15-16, *supra*) has already been fully complied with, that the corporation having been voluntarily dissolved, its debts all paid, its property transferred to other hands, and the fine and costs and attorneys' fees imposed by the judgment all paid by the deposit of the $6,000 on March 28, 1940, only three days after the affirmance by the United States Supreme Court, and accepted and distributed by the order of the insular Supreme Court of May 23, 1940 (*ante*, p. 3; R. 17-18, 20), that therefore there remained no occasion for the appointment of a Receiver, and no jurisdiction in the insular court to appoint one.

APPELLEE'S POSITION

The position of the People of Puerto Rico, the appellee, which was upheld by the insular Supreme Court (*Brief in Support of Motion for the Appointment of a Receiver* (R. 23-32) and *Reply Brief for the People* (R. 58-77), and *Opinion of the insular Supreme Court* (R. 120-127, *supra*) is on the contrary that all of those proceedings of the defendant company and of its stockholders were simply void and had no effect whatever, except as emphasizing the need for the appointment of a Receiver to preserve and protect the property and to keep it in *statu quo* and within the jurisdiction of the court pending the court's final determination as to the method of its disposition, because: (1) Upon the affirmance by the Supreme Court of the United States of the insular Supreme Court's original judgment of dissolution of July 30, 1938 (R. 15-16, *supra*) the corporation was thereby *ipso facto* dissolved and at an end,

eo instanti; so that neither it nor its stockholders could take any further steps in its name nor do anything with its property; and (2) That the attempt to transfer its property to the newly organized *sociedad*, composed of the company's own stockholders was void and ineffective for any purpose.

(3) And further that, since the People of Puerto Rico, under the second paragraph of section 2 and the second paragraph of section 6 of its "Quo Warranto Law", as amended by sections 1 and 2 of Act No. 47 of the Special Session of the Legislature, approved August 7, 1935 (Laws of 1935, Special Session, pp. 530-534; Appendix, *infra*, pp. 11-12) has six months "counting from the date on which the final sentence is rendered",—that is to say, in the present case, six months from May 13, 1940, the date on which the mandate from the United States Supreme Court affirming the insular Supreme Court's original judgment was filed (R. 19) with the clerk of the insular court; which means until November 13, 1940,— to determine "at its option, through the same procedings", whether it will confiscate the property of any corporation ordered dissolved, as was the present corporation, in *quo warranto* proceedings, because of having "performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof", therefore neither the dissolved corporation nor its stockholders could, before the expiration of that six months period, defeat this option of the insular government, nor deprive the insular court of its jurisdiction over the property in the pending suit, by their own voluntary action, or attempted action, in dissolving the corporation and executing a conveyance of its property to any third parties.

(4) That for all these reasons the insular Supreme Court properly held that it still had jurisdiction over the property as well as over the parties to this case, and could, therefore, properly appoint a Receiver for the property, in its discretion, and under the express authority given it by subdivision four (4) of section 182 of the Code of Civil Procedure of Puerto Rico, to appoint a Receiver in any case where a corporation "has forfeited its corporate rights" (*Appendix, infra*, p. 12); and that the court's exercise of its powers

and discretion in appointing the Receiver under the circumstances of this case was correct. And finally that,

(5) Such appointment of a Receiver, for the purposes merely of taking possession of and preserving the property and holding it in *statu quo* pending the insular court's final determination as to its disposition, after the government's exercise of the option given it by the above-mentioned sections of Act. No. 47 of 1935,—or after the expiration of the six months option without any action under it by the government,—was in no sense a final judgment; but was purely an interlocutory order for the temporary protection of the property, and of the jurisdiction of the court over it; and was, therefore, not appealable. And, hence, that this appeal should be dismissed for want of jurisdiction.

I

This is simply an order appointing a Receiver. It contains no decision concerning the title or the disposition of the property. It is purely interlocutory; it is in no sense final; and is, therefore, not appealable.

It is, of course, recognized that the mere fact that an order may contain provisions for the appointment of a Receiver, or may be cast in the form of an order for the appointment of a Receiver, may not in itself prevent it from being really a final judgment, if it actually contains final decisions or directions concerning the title or ultimate disposition of property or rights of the parties. Such, for example, was the situation in the case of *Knox Loan Association* vs. *Phillips*, 300 U. S. 194, 197-198, where it was pointed out in the opinion written by MR. JUSTICE CARDOZO that the order was not only one for the appointment of a Receiver, but that (at p. 197) it also embodied a specific final judgment that the respondent was "entitled to the payment of a specific sum of money", and that (*ib.*, p. 197):

"The primary purpose of the suit was the recovery of a judgment for the par value of the shares. Any other relief prayed for or awarded was tributary to that recovery; it was a form of equitable execution to make collection possible."

In such a case the fact that the order for the appointment of the Receiver was embodied in the same judgment order no more defeated the finality of the judgment than it would have defeated the finality of the judgment of July 30, 1938, of the insular Supreme Court in the present case decreeing the dissolution of the corporation, if the order for the appointment of the Receiver had actually been embodied in that same judgment order, instead of the motion for the appointment of the Receiver being ordered to be held in abeyance, as was done (R. 17, *supra*) pending the outcome of the appeal from that judgment in this court, and in the United States Supreme Court. That was the final judgment, in relation to which the order two years later, July 26, 1940, appointing the Receiver, from which this appeal is brought, was, as was said by MR. JUSTICE CARDOZO in the *Knox Loan Association* case as above quoted, only "a form of equitable execution", one of the steps in carrying the judgment into execution.

There may, of course, come a time for another final and appealable judgment in the course of these proceedings, when the time shall come for the insular court to make its determination as to the rights of the insular government upon the option it claims under Act No. 47 of the Special Session of 1935, and as to the supposed rights for which the representatives of the corporation contend to dispose of the property as they see fit, or to make some other disposition of it. But in the meantime the appointment of the Receiver is for the purposes only of conserving the property and of holding it for the final judgment of the court. The order of July 26, 1940 here appealed from is a simple order appointing a Receiver, and nothing else.

II

It is the established rule that such an order is interlocutory merely; is not a "final decision" or final judgment, and is not appealable.

The general rule is epitomized in *Corpus Juris Secundum*, "Appeal and Error", Volume 4, Section 147-a, p. 309 (4 C.J.S., p. 309) as follows:

> "In the absence of special statutory provision to the contrary, an order or decree appointing, refusing to appoint, removing, or refusing to remove, a receiver is generally held not to be appealable, either on the ground that it is merely interlocutory, or because it is discretionary; and the same is true of an order removing, or refusing to remove, a trustee or assignee for the creditors; but, if the order or decree determines rights and is a final one, an appeal will lie."

III

As above pointed out, the order of July 26, 1940, here involved does not determine rights in any way.

It appoints a Receiver to hold and preserve the property pending the litigation, for the benefit of whomsoever the court may finally determine to be entitled to it, and subject to whatever directions the court may hereafter give as to its title or disposition.[4] Hence, the general rule is applicable here. The order appointing the Receiver is interlocutory only; is not a "final decision" in any sense; and is not appealable.

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[4] The contingent directions in Paragraph 7 of the order (R. 129), for the Receiver to act for the court under alternative situations that may arise under the People's option, in case it shall be exercised, but only after his proposed steps shall be first "*submitted to the previous approval of the court*", are in no wise final. There is no present final determination.

CONCLUSION

It follows that this appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Appellee.

GEORGE A. MALCOLM,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

[fol. 176] Thereafter, to wit, on December 3, 1940, this cause came on to be heard upon appellee's motion to dismiss, Honorable Calvert Magruder, and Honorable John C. Mahoney, Circuit Judges, and Honorable John A. Peters, District Judge, sitting.

Thereafter, to wit, on January 7, 1941, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, and Honorable John C. Mahoney, Circuit Judges, and Honorable John P. Hartigan, District Judge, sitting.

Thereafter, to wit, on March 31, 1941, the following Opinion of the Court was filed:

[fol. 177] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1940

No. 3631

RUBERT HERMANOS, INC., et al., Defendants, Appellants,

v.

THE PEOPLE OF PUERTO RICO, Plaintiff, Appellee

Appeal from the Supreme Court of Puerto Rico

Before Magruder, Mahoney and Hartigan, JJ.

OPINION OF THE COURT—March 31, 1941

MAGRUDER, J.:

Complaining now of an order by the Supreme Court of Puerto Rico appointing a receiver, Rubert Hermanos, Inc., brings this case here a second time. Joined as appellants are five individuals as trustees in liquidation of the corporation. A brief résumé of the earlier phase of the litigation will help toward an understanding of the issues raised in the present appeal:

By Joint Resolution of May 1, 1900, 31 Stat. 715, Congress enacted that every agricultural corporation thereafter organized in Puerto Rico "shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land." This provision was continued in effect by the revised Organic Act, 39 Stat. 951, 965; 48 U. S. C. § 752.

Rubert Hermanos, Inc., was organized under the laws of

Puerto Rico in 1927, with articles of incorporation expressly [fol. 178] containing the aforesaid restriction as to acreage. Notwithstanding the restriction, the corporation proceeded to acquire upwards of 12,000 acres of farming land in Puerto Rico.

In 1935 the legislature of Puerto Rico passed Acts No. 33 and No. 47 [1] to implement and add sanctions to the Congres- [fol. 179] sional prohibition. The Supreme Court of Puerto Rico was by these Acts vested with original jurisdiction of all quo warranto proceedings which might thereafter be instituted by the Government of Puerto Rico for violation of the 500-acre restriction.

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[1] Act No. 33 of July 22, 1935, Laws of Puerto Rico, Special Session, 1935, p. 418, providing:

"Section 1.—There is hereby conferred upon the Supreme Court of Puerto Rico exclusive original jurisdiction to take cognizance of all *Quo Warranto* proceedings that the Government of Puerto Rico may hereafter institute for violations of the provisions of Section 752, Title 48, United States Code, and for that purpose it is provided that the violation of said provisions shall constitute sufficient cause to institute a proceeding of the nature of *Quo Warranto*.

"Section 2.—All laws or parts of laws in conflict herewith are hereby repealed. . . . .

"Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval."

Act No. 47 of August 7, 1935, Laws of Puerto Rico, Special Session, 1935, p. 530, providing:

"Section 1.—Section 2 of An Act entitled 'An Act establishing *Quo Warranto* proceedings', approved March 1, 1902, is hereby amended as follows:

" 'Section 2.—In case any person should usurp, or unlawfully hold or execute any public office or should unlawfully make use of any franchise, or likewise shall hold any office in any corporation created by and existing under the laws of Puerto Rico, or any public officer shall have done or suffered any act which, by the provisions of the law, involves a forfeiture of his office, or any association or number of persons shall act within Puerto Rico as a corporation, without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any

Several months after the passage of the latter of these two Acts, and pursuant thereto, the People of Puerto Rico commenced quo warranto proceedings in the Supreme Court of Puerto Rico against Rubert Hermanos, Inc., praying the court to adjudge the corporate franchise to have been forfeited, to decree immediate dissolution of the corporation, to impose a proper fine, and for other relief.

[fol. 180] On July 30, 1938, the court gave judgment pronouncing that the defendant corporation was guilty of a violation of the aforesaid provision of the Joint Resolution and of its own articles of incorporation, and imposing a fine of $3,000. In addition, the judgment read: "The forfeiture and cancellation of the license of the defendant corporation and of its articles of incorporation is hereby ordered and

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prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information accordingly. Where it appears to the court that the several rights of divers parties to the same office or franchise may properly be determined on the same proceeding, the court may give leave to join all such persons in the same petition, in order to try their respective rights to such office or franchise.'

"'When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of

decreed, as well as the immediate dissolution and winding up of the affairs of said corporation."

This judgment was reversed by us in Rubert Hermanos, Inc., v. People of Puerto Rico, 106 F. (2d) 754. In turn, we were reversed on certiorari, Puerto Rico v. Rubert Hermanos, Inc., 309 U. S. 543, and the case was remanded to the Supreme Court of Puerto Rico for further proceedings not inconsistent with the opinion of the federal Supreme Court.

Mr. Justice Frankfurter, speaking for the court, said that "On the only questions now before us, we think the Supreme Court of Puerto Rico acted within the scope of power validly conferred upon it by the Legislative Assembly." 309 U. S. at 550. But as the case was presented on that earlier appeal

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not more than six months counting from the date on which final sentence is rendered.

"'In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain.'

"Section 2.—Section 6 of an Act entitled 'An Act establishing *Quo Warranto* proceedings,' approved March 1, 1902, is hereby amended as follows:

"'* * *

"'Whenever, in the opinion of the court, it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof, the judgment entered shall, in case the defendant is a domestic corporation, decree the dissolution thereof and the prohibition to continue doing business in the country; and in the case of a foreign corporation, the nullity of all acts done and contracts made by the defendant corporation or entity; and in addition, said judgment shall decree the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico; and when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes, the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings

"'* * *'"

it is clear that the court did not have before it and did not intend to pass on the validity of so much of Act No. 47 as authorizes the People of Puerto Rico at its option, in the same quo warranto proceedings, to move for the confiscation [2] of unlawfully held farming land, or in the alternative, to move for the sale of such land at public auction. Nor was any question presented as to the procedure by which the People of Puerto Rico might exercise this option, assuming its validity. These questions would only arise if the People should elect to proceed with a confiscation or a public sale; but no such election had been made when the case came up before. In all three courts, Rubert Hermanos, Inc., sought to challenge the provision in Act No. 47 for confiscation or public sale as being an ex post facto penalty invalid [fol. 181] under the Organic Act, 48 U. S. C. § 737. Counsel for the insular government persuaded the courts not to pass on this issue by pointing out, correctly enough, that the People had not asked for confiscation or public sale. Obviously this did not estop the People from subsequently moving for a confiscation or public sale, in accordance with the procedure prescribed in Act No. 47. Appellee has not taken inconsistent positions. The contention of appellants to the contrary is without foundation.

On May 13, 1940, the day on which the mandate of the United States Supreme Court was received by the clerk of the Supreme Court of Puerto Rico, appellee renewed a motion for the appointment of a receiver. This motion had originally been made on July 30, 1938, just after the judgment of dissolution was entered, but the Supreme Court of Puerto Rico held it in abeyance pending the outcome of an appeal from such judgment. The only ground for appointment of a receiver avowed in the motion was that "Such dissolution and disposition of the property of the respondent shall be entrusted to a receiver."

The motion was opposed by the corporation on various grounds, the first being that "The judgment of the court has been complied with. The corporation has been dissolved, its obligations have been extinguished and it has

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[2] The word "confiscation" has an unduly harsh connotation in this connection, because it is apparent from the statute that under this alternative the land is condemned by the People upon the payment of just compensation as provided in the Condemnation Proceedings Act.

disposed of its properties by unanimous agreement of its stockholders and of the liquidators appearing herein." It seems that this had been accomplished two or three days after the decision in Puerto Rico v. Rubert Hermanos, Inc., 309 U. S. 543, was announced, March 25, 1940, by the simple expedient of transferring the properties of the corporation to a partnership composed of those who were its only stockholders.

By the order now appealed from, issued July 26, 1940, the court appointed a receiver. Authority for such appointment was found by the court to be impliedly conferred by Act No. 47 on two grounds: First, it is said, authority to decree the dissolution and winding up of the corporation necessarily presupposes power in the court to enforce compliance with its commands; appointment of a receiver is an [fol. 182] appropriate way for the court to supervise the liquidation. Second, it is said, a receivership is necessary to preserve the status quo, pending decision by the People of Puerto Rico whether to exercise their option to confiscate the excess lands or have them sold at public auction. The court also found authority to appoint a receiver in § 182, paragraph 4, of the Code of Civil Procedure.

Though the insular government asked for a receivership to liquidate the dissolved corporation, the order does not direct the receiver to proceed with the liquidation but on the contrary contemplates the full operation of the business for an indefinite period. The receiver is directed to take possession not only of the land illegally held but also of all the other property of the corporation, movable and immovable, of every kind and description. He is to continue managing said properties and cultivating the lands, until further order of court, doing all that may be necessary to maintain and preserve the business established by the defendant corporation. Specifically, he is authorized to employ, compensate and dismiss workmen, servants, agents and attorneys; to purchase and pay for materials and accessories needed; to settle with creditors all claims in the ordinary course of business; to pay taxes; to initiate and defend all actions in behalf of or against the corporation; to institute all legal proceedings necessary for the purpose of obtaining possession and control of any property of the corporation; to "give all security which might be necessary to secure loans of funds in interest of the trust confided to said receiver by these presents." All moneys coming into

the hands of said receiver as such are to be deposited in his name in one or more banks with the approval of the court, against which deposits the receiver shall have the right to draw by his personal order or by order of his agents. It is further provided that should the People of Puerto Rico request, in accordance with Act No. 47, the sale at public auction of the said properties, the receiver is authorized to proceed "in accordance with the plan which shall be submitted to the previous approval of this court or of the judge acting in the name of this court during [fol. 183] its vacation, to sell said properties at public auction." In addition, it is ordered that the defendant, its directors, officers and agents, and all those persons, partnerships or corporations claiming any right by reason of the assignment or transfer made by the defendant corporation subsequent to the date on which the judgment of dissolution was entered, shall "refrain from disposing of conveying or selling in any manner movable or immovable property of which they might be in possession or which they may have under their control, and from interfering with or obstructing the receiver or impeding him in any form from taking possession of the said properties of said corporation."

Appellee moves to dismiss this appeal on the ground that the order appointing the receiver is interlocutory merely. Interlocutory orders appointing receivers have been appealable from the United States district courts to the circuit courts of appeals for many years. 31 Stat. 660, 28 U. S. C. § 227. But under 28 U. S. C. § 225 only "final decisions" of the Supreme Court of Puerto Rico are appealable to this court.

The ordinary order appointing a receiver is truly interlocutory, leaving questions of substantive right for future determination. However, the present order does more than that. Appellants in opposing the receivership had claimed that under Act No. 47, properly construed, the option given to the People of Puerto Rico, even assuming its validity, must be exercised in the quo warranto proceedings prior to the final judgment of dissolution; that since confiscation or public auction had not been asked for by the insular government, nor provided for in the final judgment of dissolution, the option had lapsed; that under the provisions of §§ 27-29 of the Private Corporations Law of Puerto Rico (Act No. 30, March 9, 1911, as amended by Act No. 24,

April 13, 1916), when a corporation is dissolved in any manner (including forfeiture of its charter), the corporate existence is continued for purposes of liquidation and the directors are made statutory liquidators with full powers to settle the affairs of the corporation and to distribute its property; that such liquidation had been accomplished [fol. 184] and the former shareholders had acquired title to the property as partners; that when the mandate of the United States Supreme Court came down, the quo warranto proceedings in the Supreme Court of Puerto Rico terminated and there was nothing further to be done to carry out the judgment of dissolution. But the Supreme Court of Puerto Rico in the order appealed from and in the accompanying opinion has finally determined all these questions of law against appellants' contentions. The court held that "all said acts done after the date of the judgment which ended the legal existence of the defendant corporation are legally void"; and thereby ruled against the validity of the title to the old corporate property acquired by the succeeding partnership. The asserted right of the directors as statutory liquidating trustees to possess and administer the property of the corporation was finally denied. Ex parte Tiffany, 252 U. S. 32, 36. Moreover, the receiver, without further order of court, is authorized to borrow money, and as security therefor to create liens which will take precedence over the property interests of the shareholders. Such an order, in our opinion, is a "final decision" within the meaning of 28 U. S. C. § 225. See Ex parte Farmers' Loan and Trust Co., 129 U. S. 206; Texas Co. v. International Ry., 237 Fed. 921; Bibber-White Co. v. White River R. Co., 115 Fed. 786; Tornanses v. Melsing, 106 Fed. 775.

A "final decision" is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination. See Knox National Farm Loan Ass'n v. Phillips, 300 U. S. 194, 197-98; Trustees v. Greenough, 105 U. S. 527; Gay v. Hudson River Electric Power Co., 184 Fed. 689; Dant & Russell v. Halstead Lumber Co., 103 F. (2d) 306. The words "final decisions," like the equivalent "final judgments and decrees" in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given

a liberal and reasonable construction. Forgay v. Conrad, 6 How. 201, 203; City of Eau Claire v. Payson, 107 Fed. 552, 557.

[fol. 185] The motion to dismiss for lack of jurisdiction is therefore denied.

Coming then to the merits, we do not find ourselves in full agreement with the contentions of either side.

Appellants urge that there was no occasion to appoint a receiver to preserve the status quo pending election by the People pursuant to the option given in Act No. 47, because the option by its own terms had elapsed, and, if this point is not well taken, because the provision of law conferring the option is invalid.

It is said that the option has lapsed, because by its terms the People must exercise it prior to the judgment of dissolution, and this was not done. Section 1 of Act No. 47 provides that "The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered." Section 2 provides that "when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the *final judgment* shall fix the reasonable price to be paid for said property." The contention is that the clause "within a term of not more than six months from the date on which final sentence is rendered", qualifies only the last antecedent clause "or the alienation thereof at public auction"; and therefore that it is the sale that must take place within six months from the date on which final sentence is rendered. The court below, however, reads § 1 as meaning that the People of Puerto Rico have six months after the judgment of dissolution becomes final within which to apply in the quo warranto proceedings for confiscation or sale at public auction; that this judgment did not become final until the mandate of the United States Supreme Court was received by the clerk of the Supreme Court of Puerto Rico, on May 13, 1940, so that the option could be exercised at any time up to November 13, 1940. We think that this is a reasonable, perhaps the more reasonable, interpretation of the Act, and this being so, we accept the interpretation of a local statute made by the insular court. Section [fol. 186] 2 of Act No. 47 does not necessarily mean, as ap-

pellants contend, that there is to be only one final judgment in the course of the quo warranto proceedings. There may be a final "decree of nullity" upon the determination that the corporation has by its acts forfeited its charter; and if, thereafter, the People should elect to have the property sold at public auction there may, in the same proceedings, be a "final judgment" ordering the sale and fixing "the reasonable price to be paid for said property." The quo warranto proceedings were not at an end with the final affirmance by the Supreme Court of the United States of the "decree of nullity." Indeed, the mandate of the Supreme Court of the United States remanded the case to the insular Supreme Court "for further proceedings" which fairly would include any proceedings necessitated by subsequent exercise of the option.

The validity of the option provision is assailed mainly on the ground that it is in the nature of an ex post facto penalty forbidden by the Organic Act, 48 U. S. C. § 737. At the threshold of the argument it may be plausibly maintained that the provision is not a penalty at all but a remedial measure to undo the concentration of corporate land-holding brought about in violation of the public policy expressed in the Joint Resolution and in the territorial legislation. However this may be, and assuming, without deciding, that the provision is a penalty, we still do not see that its application here is ex post facto. After Act No. 47 was passed, on August 7, 1935, the corporation continued to hold the forbidden acreage without taking any steps to dispose of the excess lands and without manifesting any intention to do so. Assuming that the corporation would have to be afforded a reasonable time after the passage of the Act to dispose of its holdings, before the so-called penalty of sale by public auction could lawfully be imposed, the corporation did have such reasonable time here, and did nothing about it. The original quo warranto complaint was not filed by the People until January 28, 1936. An amended complaint was filed February 26, 1937, to which the corporation made answer August 19, 1937, claiming that the 500-acre restriction [fol. 187] did not apply to it and evincing a purpose to persist in holding the 12,000 acres. In view of what the court found to be a continuing violation for so long a time after Act No. 47 was passed, the so-called penalty, if applied in the case at bar, is not ex post facto.

We conclude that after the judgment of dissolution was finally affirmed it was still open to the People to exercise the option, and that the Supreme Court of Puerto Rico had jurisdiction in the continuing quo warranto proceedings to entertain and act on any subsequent application by the People in the exercise of the option within the six months' period.

But the order appointing a receiver was, in our opinion, improvidently issued.

"It is perhaps unnecessary to advert to certain well-settled principles governing the appointment of receivers. It is a drastic remedy, and calls for the exercise of the greatest care and judgment; and this is especially true where it is sought to take not only from the parties themselves the management of their own property, but property in the hands of a trustee." Home Mortgage Co. v. Ramsey, 49 F. (2d) 738, 742. See Pomeroy, Equity Jurisprudence (4th ed.) § 1538.

The general statutory scheme contemplates that upon dissolution the directors as liquidating trustees shall proceed to wind up the affairs of the corporation. This is true however the corporation is dissolved, whether by voluntary act, expiration of time, or decree of forfeiture. Sections 27, 28 and 30 of the Private Corporations Law of Puerto Rico are clear and unambiguous on this point. Section 27 continues the corporate existence for purposes of liquidation in the case of "all corporations, whether they expire through the limitation contained in the articles of incorporation or are annulled by the Legislature, *or otherwise dissolved.*" Section 28 provides that "Upon the dissolution *in any manner* of a corporation, the directors shall be the trustees thereof pending the liquidation, with full power to settle the affairs * * *." See Grey v. Newark Plank-Road Co., 65 N. J. Law 603, 48 Atl. 557; Watts v. Vanderbilt, 45 F. (2d) 968-70; Pomeroy, Equity Jurisprudence (4th ed.) §§ 1544, 1548. [fol. 188] "These trustees, like trustees in general, are of course amenable to the jurisdiction of a court of equity, and may be called to account there for any neglect of duty or abuse of power. But until they are so called to account in an independent action or proceeding by a party in interest, no court has any excuse for interference. * * *" Havemeyer v. Superior Court, 84 Cal. 327, 367, 24 Pac. 121, 129. In this connection § 30 of the Private Corporations Law provides that "When any corporation shall be dissolved

in any manner whatever, the district court having jurisdiction of the place where its principal office in the Island of Porto Rico is situated, on application of any creditor or stockholder, may at any time either continue the directors as trustees as aforesaid, or appoint one or more persons to be liquidators of such corporation. * * *" The implication is unmistakable that whatever the mode of dissolution; the directors automatically succeed as liquidating trustees.

The court below relied upon § 182, par. 4, of the Code of Civil Procedure. It is there provided that:

"A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof:

" * * * * * * * * * *

"4. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

This does not mean, however, that in case of dissolution, even by forfeiture, a receiver must be appointed as a matter of course. It only preserves to the courts jurisdiction to supplant the statutory trustees upon proper showing by an interested party, agreeably to the usages of courts of equity. Weatherly v. Capital City Water Co., 115 Ala. 156, 171-72, 22 So. 140, 142. See Havemeyer v. Superior Court, supra.

In the case at bar the receiver obviously was not appointed at the instance of, or to protect any imperilled interest of, either creditors or stockholders. See Havemeyer v. Superior Court, 84 Cal. 327, 369-70, 24 Pac. 121, 130.

[fol. 189] Nor have the People of Puerto Rico a sufficient interest in the premises to justify the court in continuing the operation of the business through a receiver for an indefinite period, when the owners of the corporation after its franchise has been forfeited want to wind up the corporate affairs and promptly proceed to do so.

All that remains to be done, so far as any interest of the People is concerned, is to protect the option given by Act No. 47. This option relates only to the disposition of the excess acreage of land, and has nothing to do with the other assets of the corporation of every kind and description, all of which the receiver is commanded to take into his possession by the order appealed from. The People do not

need a receiver to protect the option. If and when the time comes for the court to decree a sale of the land at public auction a master can be appointed to carry through the sale. The land will still be there. Meanwhile, the interest of the People is protected by a lis pendens notice which was entered in the Registry of Property shortly after the institution of the quo warranto proceedings, which notice the corporation unsuccessfuly sought to have cancelled.

We are informed that on August 28, 1940, after the entry of the order appointing a receiver, the Attorney General on behalf of the People of Puerto Rico filed in the court below a motion or petition concluding as follows:

"Therefore, The People of Puerto Rico elects to have all the lands in the possession of the respondent sold at public auction, and prays this Court to order the sale at public auction of the said real property by the receiver already appointed by this Court, after the same is assessed in conformity with the provisions of the Condemnation Proceedings Act now in force."

Appellant contends that Act No. 47, properly construed, confers no authority upon the Attorney General to exercise this option on behalf of the People but requires the election to be made by legislative act. This question we do not pass on now, because the Supreme Court of Puerto Rico has had no occasion to consider it. The point may be presented to that court upon remand of the case.

[fol. 190] Further questions of law may arise as to the mechanics of the sale. We shall not anticipate the many problems that may be foreseen as likely to arise in the subsequent proceedings. It will be time enough to consider them if and when an appeal comes to us from an order or decree directing a sale.

The order of the Supreme Court of Puerto is vacated, with costs to the appellants, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

On the same date, to wit, March 31, 1941, the following Order of Court was entered:

ORDER OF COURT—March 31, 1941

It is ordered that the motion to dismiss filed November 5, 1940, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

On the same date, to wit, March 31, 1941, the following Judgment was entered:

JUDGMENT—March 31, 1941

This cause came on to be heard January 7, 1941, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 31, 1941, here ordered, adjudged and decreed as follows: The order of the Supreme Court of Puerto Rico is vacated, with costs to the appellants, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

[fol. 191] Thereafter, to wit, on April 24, 1941, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 184] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.